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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 58

RUDOLPH LOMBARD, ET AL., PETITIONERS,

vs.

LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR CERTIORARI FILED DECEMBER 28, 1961
CERTIORARI GRANTED JUNE 25, 1962

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 1, 1962

[fol. 1]

IN THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

No. 168-520

Information for Violating Revised Statute 14:59(6)

STATE OF LOUISIANA

versus

ORETHA CASTLE, SYDNEY LANGSTON GOLDFINCH, JR., RUDOLPH LOMBARD, CECIL WINSTON CARTER, JR.

CHRONOLOGICAL ORDER OF MINUTE ENTRIES

Copy of Minute Entry of Wed., October 5, 1960

The above defendants appeared at the bar of the court. * * * Sidney L. Goldfinch by John Nelson, Esq., and Rudolph J. Lombard, Oretha Castle and Cecil W. Carter, Jr., by Collins, Douglas and Elie, Attys., * * * and each arraigned on the charge preferred against them and each pleaded not guilty thereto. * * * The court allowed the defendants, Sidney L. Goldfinch, Rudolph Lombard, Oretha Castle and Cecil Winston Carter, Jr., until October 17, 1960 to file further pleadings. * * *

Copy of Minute Entry of Mon., October 17th, 1960

The above defendants appeared at the bar of the court, attended by their counsel, John P. Nelson, Esq., and Lolis Elie, Esq. Mr. Nelson presented to the court on behalf of all defendants a motion to quash, together with a memoranda of authorities. The court ordered the same filed and set the matter for hearing on November 3, 1960. The court allowed the defendants until October 24, 1960, to file any further authorities. The defendants were released on their bond to await further proceedings.

Copy of Minute Entry of Thurs., November 3, 1960

The above defendants appeared at the bar of the court, Sydney Goldfinch, Jr., attended by his counsel, John P. Nelson, Esq., and Rudolph J. Lombard, Oretha Castle and Cecil W. Carter, Jr., attended by their counsel Lolis Elie, Esq., and N. R. Douglas, Esq., for hearing on defendants' motion to quash. The state was represented by Robert Zibilich, Assistant District Attorney. Mr. Zibilich presented to the court, the State's answer to the motion to quash and the court ordered the same filed. The above [fol. 2] answer was accompanied by a memoranda of authorities, which the court also ordered filed. Both sides being ready, DeLesseps S. Morrison, Joseph I. Giarrusso, Wendell Barrett were duly sworn by the clerk, testified for the defense and cross-examined by the state. In connection with the testimony of Wendell Barrett, Mr. Nelson reserved a bill of exceptions when the court limited a question asked by Mr. Nelson of the witness, as noted by the stenographer. Also in connection with the testimony of Mr. Barrett, the state made several objections to questions asked by Mr. Nelson. The court sustained the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. In connection with the above testimony, Mr. Nelson filed in evidence, Page Seven—Section One of the Times-Picayune, dated Tuesday, September 13, 1960, marked S-1; Page Eighteen—Section One of the Times-Picayune, dated Saturday, September 10, 1960, marked S-2 and House Bills Nos. 343 through 366 included of the Louisiana House of Representatives as indicated in the Official Journal of the House of Representatives of the State of Louisiana for the year 1960; and Acts of the Louisiana Legislature for the year 1960 Nos. 69, 73, 77, 78, 79, 70, 76, 81 and 68. The court ordered the above filed of record. The defense rested. The state rested. The matter was then submitted by the state and defense. The court took the matter under advisement and the defendants were released on their bond to await further proceedings.

Copy of Minute Entry of Monday, November 28th, 1960

The defendants, Sidney L. Goldfinch, Jr., Rudolph J. Lombard, Oretha Castle and Cecil W. Carter, Jr., appeared at the bar of the court, attended by their counsel John P. Nelson, Esq., Lolis E. Elie, Esq., and Nils R. Douglas, Esq., for decision on the motion to quash filed by defendants. The state was represented by Robert Zibilich, Assistant District Attorney. The court in a written opinion rendered the following judgment: "The court holds L.S.A.-R.S. 14:59(6) constitutional, and the bill of information filed thereunder good and sufficient in law. The motion to quash [fol. 3] is overruled and denied. New Orleans, Louisiana, 28th., day of November, 1960. (signed) J. Bernard Cocke, Judge." The court ordered the judgment recorded. Mr. Nelson, on behalf of all defendants reserved a bill of exceptions to the court's ruling, all as noted by the stenographer. On motion of Mr. Zibilich and by agreement of counsel for defendants, the trial of the above matter was set for December 7, 1960. The defendants were discharged on their bond to await further proceedings.

Copy of Minute Entry of Wednesday, December 7, 1960

The above defendants appeared at the bar of the court, Sidney L. Goldfinch attended by his counsel, John P. Nelson, Esq., and Rudolph L. Lombard, Oretha Castle and Cecil W. Carter, Jr., attended by their counsel, Lolis Elie, Esq., and Nils Douglas, Esq., for trial. The State was represented by Robert Zibilich, Assistant District Attorney. Both sides being ready, Robert Glen Graves was duly sworn by the clerk, testified for the state and cross-examined by the defense. In connection with the testimony of Mr. Graves, the state made objections to several questions by Mr. Nelson. The court sustained the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. On several questions by Mr. Elie, the state objected. The objections were sustained by the court. Mr. Elie reserved bills of exceptions, as noted by the stenographer. On (sic) Mr. Nelson objected to questions asked by the court of the witness. The court overruled the ob-

jections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. Wendell Barrett was duly sworn by the clerk, testified for the state and cross-examined by the defense. In connection with the testimony of Mr. Barrett, Mr. Nelson objected to questions asked by the court of the witness. The court overruled the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. The state objected to several questions asked by Mr. Nelson. The court sustained the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. Capt. Lucien Cutrera was duly sworn by the clerk, testified for the state and cross-examined by the defense. In connection with the testimony of Capt. Cutrera, the state objected [fol. 4] to several questions asked by Mr. Nelson of the witness. The court sustained the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. Mr. Nelson reserved a bill of exceptions to remarks made by the court, all as noted by the stenographer. Mr. Nelson objected to several questions asked by the state of the witness. The court overruled the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. Maj. Edward Reuther was duly sworn by the clerk, testified for the state and cross-examined by the defense. In connection with the testimony of Maj. Reuther, Mr. Nelson made an objection, which was overruled by the court. Mr. Nelson reserved a bill of exceptions, as noted by the stenographer. Bernard Fruchtweig was duly sworn by the clerk, testified for the state and cross-examined by the defense. Mr. Zibilich requested of the court that he be allowed to show a certain film, taken by the witness. There being no objection, the court ordered the film shown. Mr. Zibilich offered in evidence, the roll of film shown to the court, marked S-1. The state rested. Mr. Nelson moved the court for a directed verdict. The court denied the motion. Rudolph J. Lombard, Cecil W. Carter, Jr., Sydney L. Goldfinch, and Oretha Castle were duly sworn by the clerk, testified for the defense and cross-examined by the state. The defense rested. The state submitted the matter without argument. Mr. Nelson made an argument for the defense. The matter was submitted. The court rendered the follow-

ing judgment: "Dec. 5/60. Each defendant guilty as charged. (signed) J. Bernard Cocke, Judge." The court ordered the judgment recorded, the witnesses discharged and the defendants discharged on their bond to await sentence on January 3, 1961.

Copy of Minute Entry of Tuesday, January 3, 1961

The defendants, Sydney L. Goldfinch, Jr., Rudolph J. Lombard, Oretha Castle and Cecil W. Carter, Jr., appeared at the bar of the court, attended by their counsel, John P. Nelson, Esq., and Nils Douglas, Esq., for sentence. Mr. Nelson presented to the court, on behalf of all defendants, [fol. 5] a motion for a new trial and a motion in arrest of judgment. The court ordered the motions filed. The matter of the motion for a new trial was submitted by both sides. The court overruled the motion for a new trial. Mr. Nelson reserved a bill of exceptions, as noted by the stenographer. The matter of the motion in arrest of judgment was submitted by both sides. The court denied the motion in arrest of judgment. Mr. Nelson reserved a bill of exceptions, as noted by the stenographer. And the Court continued the matter of sentence in the above matter to January 10, 1961, and ordered the defendants released on their bond to await further proceedings.

Copy of Minute Entry of Wednesday, January 10, 1961

The defendants, Sydney L. Goldfinch, Jr., Rudolph J. Lombard, Oretha Castle, and Cecil W. Carter, Jr., appeared at the bar of the court, attended by their counsel, John P. Nelson, Esq., Nils Douglas, Esq., and Lolis Elie, Esq., for sentence. Mr Nelson presented to the court on behalf of all defendants, bills of exceptions Nos. 1, 2, 3, and 4. The court received the bills, signed same and ordered same filed. The court signed and ordered filed its per curiams to defendants' bills of exceptions, Nos. 1, 2, 3, and 4. All of the above was done in open court prior to sentence and the signing of the application for an appeal. The defendants were each sentenced by the court to pay a fine of Three hundred and fifty ($350.00) Dollars and imprison-

ment in Parish Prison for Sixty (60) days and in default of the payment of fine to imprisonment in Parish Prison for Sixty (60) days additional. Mr. Nelson, on behalf of each defendant, presented to the court an application for an appeal to the Louisiana Supreme Court. The court signed and ordered filed the application for appeal, making same returnable February 1, 1961 and with bail in the sum of $750.00 for each defendant, pending appeal.

[fol. 6]

IN THE CRIMINAL DISTRICT COURT

FOR THE PARISH OF ORLEANS

INFORMATION

The State of Louisiana) ss:

Robert J. Zibilich, Assistant District Attorney for the Parish of Orleans, who in the name and by the authority of the said State, prosecutes, in this behalf, in proper person comes into the Criminal District Court for the Parish of Orleans, in the Parish of Orleans, and gives the said Court here to understand and be informed that one

Sydney Langston Goldfinch, Jr., one
Rudolph Joseph Lombard, one
Oretha Castle, and one
Cecil Winston Carter, Jr., each,

late of the Parish of Orleans on the seventeenth day of September in the year of our Lord, one thousand nine hundred and sixty with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans, did wilfully, unlawfully and intentionally take temporary possession of the lunch counter and restaurant of McCrory's Store, a corporation, authorized to do business in the State of Louisiana, located at 1005 Canal Street, and did wilfully, unlawfully and intentionally remain in and at the lunch counter and restaurant in said place of business, after Wendell Barrett the Manager, a person in charge of such business had ordered the said Sydney Langston Gold-

finch, Jr., Rudolph Joseph Lombard, Oretha Castle and Cecil Winston Carter, Jr. to leave the premises of said lunch counter and restaurant, and to desist from the temporary possession of same, contrary to the form of the Statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same.

Robert J. Zibilich, Assistant District Attorney for the Parish of Orleans.

[fol. 7]

ENDORSEMENTS ON THE REVERSE OF THE INFORMATION FOR VIOLATING REVISED STATUTE 14:59.6

No. 168-520

Section "E"

STATE OF LOUISIANA

versus

SYDNEY LANGSTON GOLDFINCH, JR., ET AL.

Information for Vio: R.S. 14:59.6

Filed Sept. 28th, 1960

(Sig) DAN B. HAGGERTY, Deputy Clerk.

Each Arraigned Oct. 5th, 1960 and pleaded Not Guilty. (Sig) E. A. MOURAS, Minute Clerk.

Defendants allowed until Oct. 17 60 to file further pleadings. (Sigd.) E. A. MOURAS, Min. Clk.

Oct. 17/60—Motion to quash filed by all defendants. Matter set for hearing on Nov. 3/60. (Sgd) E. A. Mouras, Min. Clk.

Nov. 3/60. The State filed answer to motion to quash. Motion to quash heard and submitted by the state and defense. The court took the matter under advisement. (Sgd) E. A. Mouras, Min. Clk.

Nov. 28/60—Motion to quash overruled & denied. (see written opinion in file). (Sgd.) E. A. Mouras, Min. Clk.

[fol. 8]

Dec. 7/60—Each defendant guilty as charged. (Sgd.) J. Bernard Cocke, Judge.

Jan. 3/61—Motion for new trial and motion in arrest of judgment filed by defendants. Matters heard and submitted. The court overruled the motion for new trial and denied the motion in arrest of judgment. Matter cont. to Jan. 10/61. (Sgd) E. A. Mouras, Min. Clk.

Jan. 10/61—Bills of exceptions Nos. 1, 2, 3, & 4 filed by defendants and signed by the court. The Court signed and ordered filed per curiams to bills of exceptions. The court sentenced each defendant to pay a fine of $350.00 and imprisonment in Parish Prison for 60 days and in default of fine to imprisonment in Parish Prison for 60 days additional. Motion for appeal filed by each deft. and the court signed

the application for appeal to the Supreme Court of La., with bail in the sum of $750.00 for each deft., pending appeal. (Sgd) E. A. Mouras, Min. Clk.

[fol. 9]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

MOTION TO QUASH—Filed October 17, 1960

Now into this Honorable Court comes Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., and having heard that they have been charged in a Bill of Information in the above entitled and numbered cause, and protesting that they are not guilty of the offense set out in the said Bill of Information; moves to quash the said Bill of Information in its entirety for the reason that movers are deprived of the due process of law and equal protection of law guaranteed by the Constitution and law of the State of Louisiana, and of the United States of America as follows:

1. That the statutes under which defendants are charged are unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States of America, and in contravention of the Constitution of the State of Louisiana, in that they were enacted for the specific purpose and intent to implement and further the state's policy of enforced segregation of races.

2. That the said defendants are being deprived of their rights under the "equal protection and due process" clauses of both the Constitution of Louisiana and of the United States of America, in that the said laws under which the Bill of Information is founded is being enforced against them arbitrarily, capriciously and discriminately, in that it is being applied and administered unjustly and illegally, and only against persons of the Negro race and/or white

persons who act in concert with members of the Negro race.

3. That the statutes under which the prosecution is based and the Bill of Information founded thereon, are both so vague, indefinite and uncertain as not to establish an ascertainable standard of guilt.

4. That the statutes under which the prosecution is based, exceed the police power of the state, in that they have no real, substantial or rational relation to the public safety, health, moral, or general welfare, but have for their [fol. 10] purpose and object, governmentally sponsored and enforced separation of races, then, denying defendants their rights under the first, thirteenth and fourteenth Amendments to the United States Constitution, and Art. 1, Section 2 of the Louisiana Constitution.

5. That the Bill of Information on which the prosecution is based, does nothing more than set forth a conclusion of law, and does not state with certainty and sufficient clarity the nature of the accusation.

6. That the statutes deprive your defendants of equal protection of the law in that it excludes from its provisions a certain class of citizens namely those who at the time are active with others in furtherance of certain labor union activities.

7. That the refusal to give service solely because of race, the arrest and subsequent charge are all unconstitutional acts in violation of the Fourteenth Amendment of the United States Constitution, in that the act of the Company's representative was not the free will act of a private individual, but rather an act which was encouraged, fostered and promoted by state authority in support of a custom and policy of enforced segregation of race at lunch counters.

8. That the arrest, charge and prosecution of the defendants are unconstitutional, in that it is the result of state and municipal action, the practical effect of which is to encourage and foster discrimination by private parties.

Wherefore, the said defendants pray that this Motion to Quash be maintained and that the said Information be

declared null and void, and that they be discharged therefrom.

New Orleans, Louisiana, this 17 day of October, 1960.

Collins, Douglas & Elie, John P. Nelson Jr., By: Lolis E. Elie.

Duly sworn to by four defendants (jurats omitted in printing).

[fol. 12]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

ANSWER TO MOTION TO QUASH – Filed November 3, 1960

Now into Court comes Robert J. Zibilich, Assistant District Attorney for the Parish of Orleans, and on behalf of the State answers the motion to quash filed by defendants herein as follows:

The State denies categorically that the statute under which the defendants are charged is unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United State of America and the Constitution of Louisiana, and further denies that the defendants are being deprived of their rights under the "equal protection and due process" clauses of the Constitution of the State of Louisiana and the Constitution of the United States of America.

The State further denies that the said law is being enforced against them arbitrarily, capriciously and discriminately, and further denies that the statute is so vague as to render it unconstitutional.

Wherefore, your respondent prays that this answer be deemed sufficient and that the matter be proceeded with according to law.

November 3, 1960.

Robert J. Zibilich, Assistant District Attorney, Parish of Orleans.

[fol. 13]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

Transcript of Testimony on Motion to Quash—November 3, 1960

Testimony taken in Open Court before the Honorable J. Bernard Cocke, Judge Presiding on the 3rd day of November, 1960, on the hearing on the Motion to Quash the Information in the above numbered and entitled cause.

APPEARANCES:

Robert J. Zibilich, Esq., Assistant District Attorney, For the State.

John P. Nelson, Esq., Lolis E. Elie, Esq., Nils Douglas, Esq., Attorneys for defendants Goldfinch, Lombard, Castle and Carter.

Reported by: Charles A. Neyrey, Official Court Reporter, Section "E".

[fol. 14]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: State ready?

Mr. Zibilich: State's ready.

Mr. Nelson: We are ready Your Honor.

The Court: Under what particular phase is it that you want to take up?

Mr. Nelson: The phase dealing strictly with the Motion to Quash and the Constitutional questions therein, and the purpose of this hearing is to introduce evidence in support of our Motion to Quash.

The Court: As I understand your contention, you claim it is the administration of this particular law which you say is unconstitutional because of its administration.

Mr. Nelson: That is one of the points Your Honor. There

is listed in our memorandum five major points of our Motion to Quash.

The Court: I won't permit you to take evidence on anything but that one point, and that is the only handling of the case on which any testimony will be taken.

Mr. Nelson: Yes, Your Honor.

The Court: You want to excuse Mr. Dowling?

Mr. Nelson: Yes sir and Captain Cutrera is excused also.

The Court: Proceed.

[fol. 15]

DELESSEPS STORY MORRISON, called as a witness for Mover, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. What is your name please?

A. deLesseps S. Morrison.

Q. And Mr. Morrison you are presently the Mayor of the City of New Orleans?

A. Correct.

Q. In connection with your duties as Mayor are you also the Chief Law Enforcement officer?

A. The Superintendent of Police I would say is the chief law enforcement officer, but he serves under my direction, so I do have that responsibility.

Q. It is part of your duties to set policy for the police and to also encourage them to take certain action in any particular cases?

A. It is the policy of my office and that of the City government to set the line or direction of policy to the police department.

Q. In connection with your duties of Mayor—first, you were the Mayor during the month of September 1960?

A. Correct.

Q. How long have you been Mayor of the City of New Orleans?

A. Fourteen and a half years.

Q. Directing your attention to Friday, September 9th, do you recall an incident where they had a sit-in demonstration at the Woolworth Store in the city of New Orleans?

A. It was reported to me, yes.

Q. Now, I show you a copy of the Times-Picayune dated Tuesday morning, September 13th, 1960, Page 7 of Section 1 to where it says "Sit-in Out Mayor warns", and particularly a quote that is in red lines in that column and ask you [fol. 16] if you will kindly read it, not out loud but to yourself.

A. Correct.

Q. Is that an accurate report of the statement which you issued on that date?

A. It is.

Q. This report was issued as a result of what?

A. Well this was following the initial sit-in and follow-up demonstration the next day, I believe by picketing in the same area, and I outlined to the police department and the community the two acts of the Legislature 70 and 80 which dealt with this matter and gave the reasons in the public interest that we should carry out the intent and purpose of the law. Briefly that was it.

Mr. Nelson: In connection with the Mayor's testimony, would like to offer, introduce and file in evidence Page 7 of the Times-Picayune of Tuesday morning, September 13th, and mark it for identification as Defense-1.

Mr. Zibilich: No objection.

The Court: Let it be filed.

Examination (resumed).

By Mr. Nelson:

Q. To your knowledge do you know of any establishments in the City of New Orleans which, eating establishments, which caters to both negroes and white?

A. I would have no way of answering that, and I have to have personal knowledge in order to answer, and there are thousands of places in New Orleans and I could not speak for what they are doing each one of them.

Q. In your experience in traveling throughout the town, do you know of any establishments that serve both?

A. I haven't seen anywhere where they had mixed lunch [fol. 17] counters, but there are some that handle both negroes and whites at separate counters.

Q. But as far as negroes and whites eating at the same counter?

A. I have not seen any, but I repeat that I have to testify of my own personal knowledge.

Q. And you have not seen any that served both at the same counter anywhere in this city?

A. I have not.

Q. Referring to sit-in demonstrations in your report, you are referring to sit-in demonstrations of the type that were performed in the Woolworth Department Store in this city?

A. Yes sir.

Q. And sit-ins of a similar nature?

A. That is correct.

Q. I have no further questions.

By Mr. Elie:

Q. In answer to counsel's questions you stated that with reference to acts 70 and 80 of the 1960 Legislature, you say that the intent or was—you say that the intent you made reference to, to the intent and purpose of those acts?

A. Right.

Q. In your opinion would you say the intent and purpose was to prevent Negroes from—

The Court: I will determine myself as to what the intent and purpose of the Acts were. That is a question of law.

Mr. Elie: I submit that as chief legal officer, the opinion of the Mayor as regards—

The Court: That is correct with reference to any instructions directed to the Police Department. You have a right to draw whatever inferences from that in connection with [fol. 18] the testimony given, but in the long run I will decide what the intent and purpose of the law is.

Cross examination.

By Mr. Zabilich:

Q. In your releases to the press concerning alleged sit-in demonstrations at Woolworth, did you make any references whatsoever to Revised Statutes 14:59? Did you make any references to the criminal mischief law of the State?

A. I was, in the connection—

Q. You may explain your answer.

A. My statement did encompass any laws covering questions of disturbing the peace, of public acts which would create a disturbance or confusion, disturbances of the peace, and I specifically quoted these two acts because they are of recent nature and somewhat specific in regard to the question, but I have a feeling that matters of this kind, when persons engage in this type of demonstration, this type of activity as a natural consequence will create disturbances of the peace and in many cases set off chain reactions that can be much more serious.

Redirect examination.

By Mr. Elie:

Q. Did you receive any advice from anyone, any legal advice—

Mr. Zibilich: I object.

The Court: The Mayor is a lawyer, and one of the best.

The Mayor: Thank you Judge, but I'm not that good.

[fol 19] Joseph I. Giarrusso, a witness for Mover, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. What is your full name?

A. Joseph I. Giarrusso.

Q. What is your present occupation Mr. Giarrusso?

A. Superintendent of Police.

Q. Of the City of New Orleans?

A. Yes sir.

Q. Were you so employed during the month of September of 1960?

A. Yes sir.

Q. You recall Mr. Giarrusso an incident involving a sit-in demonstration in Woolworth's on September 9th, 1960?

A. Yes sir.

Q. In connection with that sit-in demonstration did you on September 10th, do you recall issuing a statement to the public generally, do you recall issuing a statement?

A. Yes sir.

Q. In that connection I show you a copy of the Saturday morning Times-Picayune dated September 10th, and direct your attention to Page 18 Section 1, and what purports to be a quote from you. Would you kindly read that within the red lines. (complies) Superintendent Giarrusso, is that an accurate report of the statement you issued following the sit-in demonstration, following the Woolworth sit-in demonstration?

A. Yes sir.

Q. And this statement, what was the reason for the issuance of this statement, Superintendent?

A. The reason for it. As the statement says I was hoping that situations of this kind would not come up in the future [fol. 20] to provoke any disorder of any kind in the community.

Q. I gather the situation you refer to are situations such as at the Woolworth's Store and similar establishments?

A. That is right.

Mr. Nelson: Like to offer, introduce and file in evidence, Page 18, Section 1 of the Times-Picayune dated September 10th, and mark same Defense 2.

Mr. Zibilich: No objection.

The Court: Let it be filed.

Examination (resumed).

By Mr. Nelson:

Q. How long have you been a member of the New Orleans Police Department?

A. Going on fifteen years.

Q. In your experience as a member of the New Orleans Police Department, and a resident of the city of New Orleans, do you know of any public establishments that cater to both Negroes and whites at the same lunch counters in the city of New Orleans?

Mr. Zibilich: I object. I don't know whether it is relevant.

The Court: I am going to permit the answer. The objection is overruled.

A. No, sir, I do not.

Mr. Zibilich: No questions.

[fol. 21] Mr. Wendell Barrett, a witness for Mover, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. Your full name please?
A. Wendell Barrett.
Q. What is your present address?
A. 4934 Reed Boulevard.
Q. Is that in the City of New Orleans?
A. New Orleans 27.
Q. Your present occupation?
A. Manager of McCrory's 5 and 10 Cents Store.
Q. How long have you been manager?
A. In this store?
Q. Yes.
A. Three years, almost 2½ to 3 years.

Q. What type of store is McCrory's?
A. Store made up of individual departments.
Q. That caters to the general public?
A. That caters to the general public.
Q. What do they sell?
A. Well each thing?

The Court: Everything but drugs and the drug store sells everything else.

A. Drugs too Your Honor.

Examination (resumed).

By Mr. Nelson:

Q. Were you ever manager of any other McCrory's stores?
A. Savannah, Georgia and Valdesta, Georgia.
Q. And also New Orleans?
A. Yes sir.
Q. McCrory's Store here, in New Orleans, is that part of a national chain?
[fol. 22] A. It is.
Q. What is the name of the National chain?
A. McCrory Stores Incorporated.
Q. And in approximately how many states does it operate?
A. Approximately 34 states.
Q. Mr. Barrett, what is the general policy of McCrory Stores Inc. relative to segregated lunch counters?

Mr. Zibilich: I am going to object to any further questioning along these lines. The purpose for this testimony is in connection with the Motion to Quash wherein it is alleged that the administration of the law by certain law enforcement officials is unconstitutional. Mr. Barrett by his own testimony is not a member of the New Orleans Police Department and is also not a member of any other law enforcement agency.

The Court: I am going to overrule the objection as to what the policy is of McCrory's Stores Incorporated. We are not interested in what they do in California and Con-

necticut or anywheres else. There may be a general policy but confine ourselves to what is the policy of this particular store within this particular jurisdiction. So with that explanation the objection is overruled.

Mr. Nelson: Then I can ask that question?

The Court: I am not going to permit the general policy of McCrory's as it might effect the other 34 states to go into this record, because the only thing we are interested in is the policy in this particular store. That policy may be dictated nationally, that may be true, but I'm not interested in what the other 33 states do.

Mr. Nelson: Before I take my bill I want to be sure that [fol. 23] I remember the question exactly.

The Court: Read the question.

The Reporter: "Question: Mr. Barrett, what is the general policy of McCrory Stores Inc. relative to segregated lunch counters?"

Mr. Nelson: I understand that the court sustains the objection.

The Court: I overrule the objection, but I won't permit or rather I want you to limit your question as to the policy as it relates to the store in this jurisdiction. There may be a national policy, but how can it effect this store, in this city in its operations. Ask him what the policy is of this store and then it might lead to the national policy.

Mr. Nelson: Before I get off the question, the purpose of that question is the local policy is dependent on the national policy. It was strictly for convenience.

The Court: I come back to the same proposition. Ask him about the local policy and see if there is any necessity to go into the national policy.

Mr. Nelson: Respectfully object and reserve a bill of exceptions making part of the bill, the question, the court's ruling and the comments of the court.

The Court: Let the record show that the ruling of the court is that your general question, that I am limiting you at this time—I overruled the objection of the state, but suggested that you confine yourself as to the policy that effected the local store. It may be that after this witness [fol. 24] answers that I may allow you to go into the

national policy, but at this time I am not interested in the national policy.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett, what is the policy of McCrory's relative to segregation of lunch counters here in New Orleans?

A. The policy is determined by local tradition, law and custom, as interpreted by me.

By the Court:

Q. Who makes that decision?

A. Interpreted by me.

Q. By you?

A. Yes sir.

Examination (resumed).

By Mr. Nelson:

Q. Who gives—who sets the standard by which you are to judge and what you base your decision on, that comes from the national office?

A. I am appointed store manager of this store in this city.

By the Court:

Q. He wants to know is does the national office of your concern permit you to determine who, are rather how, you should operate that particular store in connection with the tradition, laws and customs of the community in which the store is located?

A. I do. I would answer yes.

By Mr. Nelson:

Q. Have you ever been employed in any McCrory's store that was desegregated?

A. No I haven't.

Q. Do you know the procedure McCrory's follows before they desegregate any particular lunch counter in any particular town?

Mr. Zibilich: I object Your Honor. We are only interested in what is here.

The Court: Objection sustained.

[fol. 25] Mr. Nelson: Reserve a bill making the question, answer and ruling of the court part of the bill.

The Court: I want the record again to show, so there will be no confusion. My appreciation of this gentleman's response was that locally he had the right, he was permitted, that he established the policy of the store based upon custom, law and—what was the word?

A. Tradition.

—tradition. The next question was whether or not he had that power from a national standpoint to determine for himself here how he should operate the store and he stated he had. We are not interested in what happened in Connecticut or any other place.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett, the management of McCrory's Inc., have the authority to desegregate these counters, overruling your personal opinion—

Mr. Zibilich: Object Your Honor.

The Court: The objection is well taken.

Mr. Nelson: Reserve a bill of exception making the question and the ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett, have you sir in the last 30 days to 60 days entered into any conference with other department store managers here in New Orleans relative to sit-in problems?

A. I don't know what you mean by conferences.

Q. Discussions with them?

A. We have spoken of it, yes.

Q. Have you discussed methods and means to handle [fol. 26] these situations if they arise in any particular department store?

Mr. Zibilich: Renew my original objection.

The Court: The objection is well taken. I won't permit you to go any further. You can dictate into the record what you want to ask of this witness.

Mr. Nelson: Respectfully object and reserve a bill of exceptions making the question, the objection and the ruling of the court as part of the bill.

Mr. Nelson: The purpose of this Your Honor is a question of conformity with state policy.

The Court: The man already said that he had the right to determine the policy based on tradition, custom and the laws of the community. Is that going to affect me in the slightest that he had a meeting with the manager of D. H. Holmes or Godchaux or anybody else, and I don't see the relevancy of it at all. You have established the policy of this store and the policy nationally dictated giving him the discretion. What more do you want?

By Mr. Nelson:

Q. Mr. Barrett, have you ever met with members of the New Orleans Police Department and discussed problems of sit-in demonstrations and how you or how they should be handled if they arise in your store?

Mr. Zibilich: Object.

The Court: Same ruling.

Mr. Nelson: Respectfully object and reserve a bill of exception, making the question, the objection and the ruling of the court part of the bill.

[fol. 27] By Mr. Nelson:

Q. Now Mr. Barrett, would you kindly tell the court the plan or procedure that your store uses here in the city when sit-in demonstrations take place?

Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: Respectfully object and reserve a bill of exception making the question, objection and the ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Do you have a plan that your employees are aware of which is to go into effect if there is a sit-in demonstration in your store?

Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: Reserve a bill making the question, objection and ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Now in your sit-in demonstration, when it took place in your store, it involved some Negroes did it not?

A. Yes sir.

Q. And I'm talking now about the sit-in demonstration that took place on September 17th?

A. Yes sir.

Q. Were you in the store?

A. Yes sir.

Q. Now there was also one white person involved in this was there not?

A. Yes sir.

Q. If these persons would have been white all of them, [fol. 28] would they have been given service at that particular lunch counter on that particular day?

Mr. Zibilich: Objection.

The Court: The objection is well taken.

Mr. Nelson: Reserve a bill making the objection, the question, and the ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Did these people that came into your store on the 17th, of September, involved in the sit-in demonstration, were they well dressed?

Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: Same bill of exception, making the question, objection and ruling of the court part of the bill.

The Court: Might I say again to explain my ruling. As long as this gentleman had the discretion that he admitted he had, both locally as well as the approval of his national organization, the question then becomes a question of law, whether that discretion that he said he had, without regard to how he used it, if he had that discretion and had a right to use it, out of the window goes the rest. If he didn't have it because of the 14th Amendment to the Constitution or any other amendment, your point of law is good then.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett, I understand you exercise that discretion and it conforms to state policy and practice and custom in this area, is that right sir?

A. Yes sir.

[fol. 29] Examination (resumed).

By Mr. Nelson:

Q. And if the state policy or practice would be different you would exercise your discretion in a different manner?

Mr. Zibilich: Objection.

The Court: Objection sustained. If he had that discretion he had a right to change it at any time, if he had that right. You have proved that abundantly.

Mr. Nelson: Reserve a bill of exception, making the question, the objection, and the ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett, if there was no custom of segregated lunch counters or no state policy, the general atmosphere would be different, would you allow Negroes to eat at white lunch counters?

Mr. Zibilich: Same objection.
The Court: Same ruling.
Mr. Nelson: The same bill of exception.
I have no further questions.

Cross examination.

By Mr. Zibilich:

Q. Mr. Barrett, are you a police officer?
A. No sir.
Q. I have no other questions.

[fol. 30] Mr. Nelson: Your Honor, in connection with this case I would like to offer into evidence, I believe that the court can take judicial notice, but out of an abundance of caution I would like to offer the following:

House bills of the Louisiana Legislature of 1960, House bills 343 through 366, which bills were all introduced by Representatives Fields, Lymon and Triche and to be specific Numbers 343, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 360, 61, 62, 63, 64, 65, 66. All of which bills did not pass, but they are in the Journal, Legislature Journal and I make them part of my record.

Mr. Zibilich: No objection.

Mr. Nelson: And I'm sure that the court can take judicial notice of these.

The Court: Those that passed I am sure, but the others I don't know.

Mr. Nelson: Like to make part of the record those specific bills in question.

The Court: Let it be filed.

Mr. Nelson: Specifically the Court can take judicial cognizance of the Acts setting up the Louisiana State Sovereignty Commission and what their policy and procedures have been, and I am sure that the Court can take judicial notice of that but I point it out to the court specifically.

The Court: You may offer or call to the court's attention the things you think are important.

[fol. 31] Mr. Nelson: One last thing. The house bills, the ones that were specifically passed, which are in the advance sheets of the West Publication and they are acts, —it is not necessary to go into them by number, but—

The Court: If you have the numbers give them.

Mr. Nelson: Acts 69, 73, 77, 78, 79, 70, 76, 81 and 68. Those are the acts, which amend the criminal statutes, relative we submit to the sit-in demonstrations and that is our case.

The Court: That concludes your evidence

Proceed to the arguments.

Mr. Nelson: I submit it.

Mr. Zibilich: State will submit it.

The Court: Let the minute entry show that the matter on the motion to quash has been submitted.

The defendants are discharged on their bonds until again notified.

[fol. 32]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

STATE OF LOUISIANA

versus

SIDNEY L. GOLDFINCH, JR., ET AL.

JUDGMENT ON MOTION TO QUASH—November 28, 1960

The defendants, Rudolph Lombard, a colored male, Oretha Castle, a colored female, Cecil Carter, Jr., a colored male, and Sydney L. Goldfinch, Jr., a white male, are jointly charged in a bill of information which reads as follows:

"* * * that on the 17th of September, 1960, each d ' wilfully, unlawfully and intentionally take temporary possession of the lunch counter and restaurant of McCrory's Store, a corporation authorized to do business in the State of Louisiana, located at 1005 Canal Street, and did wilfully, unlawfully and intentionally remain in and at the lunch counter and restaurant in said place of business after Wendell Barrett the manager, a person in charge of said business, had ordered the said Sydney Langston Goldfinch, Jr., Rudolph Joseph Lombard, Oretha Castle and Cecil Winston Carter, Jr., to leave the premises of said lunch counter and restaurant, and to desist from the temporary possession of same, contrary, etc."

The particular statute under which defendants are charged is L.S.A.-R.S. 14:59 (6) which reads as follows:

"Criminal mischief is the intentional performance of any of the following acts: * * *

"(6) taking temporary possession of any part or parts of a place of business, or remaining in a place of

business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

The defendants moved the Court to quash the bill of information.

As cause for quashing the bill, defendants alleged "that movers were deprived of the due process of law and equal protection of law guaranteed by the Constitution and laws of the State of Louisiana and of the United States of America as follows:"

[fol. 33] "(1) That the statutes under which the defendants are charged are unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States of America, and in contravention of the Constitution of the State of Louisiana, in that they were enacted for the specific purpose and intent to implement and further the states policy of enforced segregation of races.'

"(2) That the said defendants are being deprived of their rights under the "equal protection and due process" clauses of both the Constitution of Louisiana and of the United States of America in that the said laws under which the bill of Information is being enforced against them arbitrarily, capriciously and discriminately, in that it is being applied and administered unjustly and only against persons of the Negro race and/or white persons who act in concert with members of the Negro race.'

"(3) That the statutes under which the prosecution is based and the Bill of Information founded thereon, are both so vague, indefinite and uncertain as not to establish an ascertainable standard of guilt.'

"(4) That the statutes under which the prosecution is based, exceed the police power of the state in that they have no real, substantial or rational relation to the public safety, health, morals, or general welfare, but

have for their purpose and object, governmentally sponsored and enforced separation of races, thus, denying the defendants their rights under the first, thirteenth and fourteenth Amendment to the United States Constitution and art. I Section 2 of the Louisiana Constitution.'

"(5) That the bill of information on which the prosecution is based, does nothing more than set forth a conclusion of law, and does not state with certainty and sufficient clarity the nature of the accusation.'

"(6) That the statutes deprive your defendants of equal protection of the law in that it excludes from its provisions a certain class of citizen, namely those who are at the time active with others in furtherance of certain union activities.'

"(7) That the refusal to give service because of race, the arrest and subsequent charge are all unconstitutional acts in violation of the Fourteenth Amendment of the United States Constitution in that the act of the Company's representative was not the free will act of a private citizen but rather an act which was encouraged, fostered and promoted by state authority in support of a custom and policy of enforced segregation of races at lunch counters.'

"(8) That the arrest, charge and prosecution of defendants are unconstitutional, in that it is the result of state and Municipal action, the practical effect of which is to encourage and foster discrimination by private parties."

In support of their motion to quash, the defendants offered the testimony of the following named witnesses, deLesseps S. Morrison, Mayor of the City of New Orleans, Joseph I. Giarrusso, Superintendent of Police, and Wendell [fol. 34] Barrett, Manager of McCrory's 5 and 10 Cents Store.

The Mayor testified in substance as follows:

That the Superintendent of Police serves under his direction; that he and the City Government "set the lines or direction of policy to the police department".

That a statement appearing in the Times-Picayune dated September 13, 1960, page 7 of Section 1, was an accurate report of a statement issued by him following the initial "sit-in" and follow up demonstration at the F. W. Woolworth Store on September 9, 1960.

The essence of the Mayor's statement filed in evidence was, that he had directed the superintendent of police not to permit any additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers; that it was his determination that the community interest, the public safety, and the economic welfare of the city required that such demonstrations cease and that they be prohibited by the police department.

The Mayor further testified:

That he did not know of any places in the City of New Orleans, where whites and negroes were served at the same lunch counter.

The Superintendent of Police identified as accurate a statement of his appearing in the Times-Picayune, Page 18, Section 1, dated September 10, 1960; that his reason for issuing the statement was that a recurrence of the sit-in demonstration as had occurred at the Woolworth Store on September 9, 1960, would provoke disorder in the community.

In his statement, the Superintendent of Police, made known that his department was prepared to take prompt and effective action against any person or group who disturbed the peace or created disorders on public or private property. He also exhorted the parents of both white and negro students who participated in the Woolworth Store "sit-in" demonstration to urge upon these young people that such actions were not in the community interest; etc.

[fol. 35] He further testified that as a resident of the City of New Orleans and as a member of the police de-

partment for 15 years, he did not know of any public establishment that catered to both white and negro at the same lunch counter.

Mr. Wendell Barrett testified, that he was and had been the Manager of McCrory's 5 and 10 Cents Store in the City of New Orleans for about 3 years; that the store was made up of individual departments, and catered to the general public.

That the policy of McCrory's national organization as to segregated lunch counters, was to permit the local manager discretion to determine same, consideration being had for local tradition, customs and law, as interpreted by the local manager; that in conformity with this policy, he determined whether lunch counters in the local McCrory's store would be segregated or not.

That on September 17th., 1960, there was a "sit-in" demonstration in the local store of McCrory's, involving one white man and some negroes; that he was in the store at the time.

At the conclusion of the testimony of this witness, the defendants offered in evidence, "House bills of the Louisiana Legislature of 1960, 343 through 366, which bills were all introduced by Representatives Fields, Lehrman and Triche, and to be specific Numbers 343, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 360, 61, 62, 63, 64, 65, 66. All of which bills did not pass, but they are in the Journal. Also introduced and received in evidence were Acts 69, 73, 77, 78, 79, 70, 76, 81 and 68.

The motion to quash was submitted without argument.

A consideration of defendants' motion to quash, as well as the factual presentation on the hearing thereof, discloses defendants' position to be, that the enactment of L.S.A.-R.S. 14:59(6) by the Louisiana Legislature of 1960, was part of a "package deal", wherein, and with specific [fol. 36] purpose and intent, that body sought to implement and further the state's policy of enforced segregation of the races.

In addition, the same pleading and factual presentation, was offered by defendants' to support their contention, that L.S.A.-R.S. 14:59(6), was enforced against them arbitrarily, capriciously and discriminately in that it was be-

ing applied and administered unjustly and illegally, and only against persons of the negro race, and or white persons who acted in concert with members of the Negro race.

The courts have universally subscribed to the doctrine contained in the following citations:

Presumptions and Construction in Favor of Constitutionality

"The constitutionality of every statute is presumed, and it is the duty of the court to uphold a statute wherever possible and every consideration of public need and public policy upon which Legislature could rationally have based legislation should be weighed by the court, and, if statute is not clearly arbitrary, unreasonable and capricious it should be upheld as constitutional."

State vs. Rones, 67 So. 2d. 99, 223 La. 839.

Michon vs. La. State Board of Optometry Examiners, 121 So. 2d. 565.

"The constitutionality of a statute is presumed and the burden of proof is on the litigant, who asserts to the contrary, to point out with utmost clarity wherein the constitution of the state or nation has been offended by the terms of the statute attacked."

Olivedell Planting Co. v. Town of Lake Providence, 47 So. 2d. 23, 217 La. 621.

"Presumption is in favor of constitutionality of a statute, and statute will not be adjudged invalid unless its unconstitutionality is clear, complete and unmistakable."

State ex rel Porterie v. Grosjean, 161 So. 871, 182 La. 298.

"The courts will not declare an act of the legislature unconstitutional unless it is shown that it clearly violates terms of articles of constitution."

Jones v. State Board of Ed. 53 So. 2d. 792, 219 La. 630.

[fol. 37] "A legislative act is presumed to be legal until it is shown that it is manifestly unconstitutional,

and all doubts as to the validity are resolved in favor its constitutionality."

"The rule that a legislative act is presumed to be legal until it is shown to be manifestly unconstitutional is strictly observed where legislature has enacted a law in exercise of its police powers."

Board of Barber Examiners of La. v. Parker, 182 So. 485, 190 La. 314.

"Where a statute is attacked for discrimination or unreasonable classification doubts are resolved in its favor and it is presumed that the Legislature acts from proper motives in classifying for legislative purposes, and its classification will not be disturbed unless it is manifestly arbitrary and invalid."

State vs. Winchall & Rosenthal, 86 So. 781, 147 La. 781, Writ of Error dismissed (1922). Winchall & Rosenthal of State Louisiana, 42 S. Ct. 313, 258 U. S. 605, 66 L. Ed. 786.

"In testing validity of a statute the good faith on part of Legislature is always presumed."

State vs. Saia, 33 So. 2d. 665, 212 La. 868.

"There is strong presumption Legislature understands and appreciates needs of people, and that its discriminations are based on adequate grounds."

Festervand v. Lester, 130 So. 635, 15 La. App. 159.

"A statute involving governmental matters will be construed more liberally in favor of its constitutionality than one affecting private interests."

State ex rel LaBauve v. Mitchel, 46 So. 430, 121 La. 374.

"State is not presumed to act arbitrarily in exercising police power."

State ex rel Porterie, Atty. Gen. v. Walmsley, 162 So. 826, 183 La. 139, Appeal dismissed Board of Liquidation v. Board of Com'rs. of Port of New Orleans, 56 S. Ct. 141, 296 U. S. 540, 80 L. Ed. 384, rehearing denied Board of Liquidation, City Debt of New Orleans v. Board of Comrs.

of Port of New Orleans, 56 S. Ct. 246, 296, U. S. 663, 80 L. Ed. 473.

"Where a law is enacted under exercise or pretended exercise of police power and appears upon its face to be reasonable, burden is upon party assailing such law to establish that its provisions are so arbitrarily and unreasonable as to bring it within prohibition of Fourteenth Amendment. U.S.C.A. Const. Amend. 14".

State vs. Saia, 33 So. 2d. 665, 212 La. 868.

[fol. 38] "Act of Legislature is presumed to be legal, and the judiciary is without right to declare it unconstitutional unless that is manifest, and such rule is strictly observed in cases involving laws enacted in the exercise of the state's police power."

Schwegmann Bros. v. Louisiana Bd. of Alcohol Beverage Control., 43 So. 2d. 248, 216 La. 148, 14 A. L. R. 2d. 680.

L.S.A.-R.S. 14:59 (6) Under Which the Prosecution Is Based and the Bill of Information Founded Thereon, Are So Vague, Indefinite and Uncertain as Not to Establish an Ascertainable Standard of Guilt?

Defendants' above stated complaint is without merit. L.S.A.-R.S. 14:59 (6) under which defendants are charged reads as follows:

"Criminal mischief is the intentional performance of any of the following acts: * * *

(6) "Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

The bill of information alleges:

"* * * that on the 17th. of September, 1960, each did wilfully, unlawfully and intentionally take temporary possession of the lunch counter and restaurant of

McCrory's Store, a corporation authorized to do business in the State of Louisiana, located at 1005 Canal Street, and did wilfully, unlawfully and intentionally remain in and at the lunch counter and restaurant in said place of business after Wendell Barrett the manager, a person in charge of said business, had ordered the said Sydney Langston Goldfinch, Jr., Rudolph Joseph Lombard, Oretha Castle and Cecil Winston Carter, Jr., to leave the premises of said lunch counter and restaurant and to desist from the temporary possession of same, contrary, etc."

From the foregoing it will be seen that L.S.A.-R.S. 14:59 (6) as well as the bill of information filed thereunder, meet the constitutional rule governing the situation.

[fol. 39] "When the meaning of a statute appears doubtful it is well recognized that we should seek the discovery of the legislative intent. *However, when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for construction.*"

State v. Marsh, et al., 96 So. 2d. 643, 233 La. 388.
State v. Arkansas Louisiana Gas Co., 78 So. 2d. 825, 227 La. 179.

"Meaning of statute must be sought in the language employed, and if such language be plain it is the duty of courts to enforce the law as written."

State ex rel LeBlanc v. Democratic Central Committee, 86 So. 2d. 492, 229 La. 556.
Texas Co. v. Cooper, 107 So. 2d. 676, 236 La. 380.
Beta Xi Chapter, etc. v. City of N. O., 137 So. 204, 18 La. App. 130.
Ramey v. Cudahy Packing Co., 200 So. 333.

"Statute, which describes indecent behaviour with juveniles as commission by anyone over 17, of any lewd or lascivious act upon person or in presence of any child under age of 17, with intention of arousing or gratifying sexual desires of either person, which states that lack of knowledge of child's age shall not be a

defense, and which provides penalty therefor, sufficiently describes acts which constitute violation of statute and therefore, is constitutional. L.S.A.-R.S. 14:81."

State v. Milford, 73 So. 2d. 778, 225 La. 611.
State v. Saibold, 213 La. 415, 34 So. 2d. 909.
State v. Prejean, 216 La. 1072, 45 So. 2d. 627.

"The statute defining the crime of simple escape from 'lawful custody' of official of state penitentiary or from any 'place where lawfully detained' uses the quoted words in their common or ordinary meanings and is not violative of state or federal constitutions in failing to define the terms. L.S.A.-R.S. 14:110, L.S.A.-Const. Art. 1, Sec. 10; U.S.C.A.-Const. Amend. 14."

State v. Marsh, 96 So. 2d. 643, 233 La. 388.

L.S.A.-R.S. 15:227 provides:

"The indictment must state every fact and circumstance necessary to constitute the offense, but it need do no more, and it is immaterial whether the language of the statute creating the offense, or words unequivocally conveying the meaning of the statute is used."

"Information charging defendant violated a specific statute in that he entered without authority a described structure, the property of a named person, with the intent to commit a theft therein, set forth each and every element of the crime of simple burglary and fully informed accused of the accusation of the nature [fol. 40] and cause of the accusation, and therefore, was sufficient."

State v. McCrory, 112 So. 2d. 432, 237 La. 747.

"Where affidavit charged defendant with selling beer to minors under 18 years of age in the language of the statute, and set all the facts and circumstances surrounding the alleged offense, so that court was fully informed of the offense charged for the proper regulation of evidence sought to be introduced, and the accused was informed of the nature and cause of the

accusation against her, and affidavit was sufficient to support a plea of former jeopardy, affidavit was sufficient to charge offense."

State v. Emmerson, 98 So. 2d. 225, 233 La. 885.
State v. Richardson, 56 So. 2d. 568, 220 La. 338.

L.S.A.-R.S. 14:59(6) upon which this prosecution is based is sufficient in its terms to notify all who may fall under its provisions as to what acts constitute a violation of the law, and the bill of information meets fully the requirements of the law.

The Bill of Information on Which the Prosecution Is Based, Does Nothing More Than Set Forth a Conclusion of Law, and Does Not State With Certainty and Sufficient Clarity the Nature of the Accusation?

There is no merit to this contention.

As has been heretofore shown, the bill of information states "facts and circumstances" in compliance with the Constitutional mandate, L.S.A.-R.S. 15:227, and the decisions of the Supreme Court. The words used in describing the offense are those of L.S.A.-R.S. 14:59(6), and are not conclusions of law by pleader.

"Information for taking excess amount of gas from well held not to state mere conclusions, where showing amount allowed and amount taken. Act No. 252, of 1924, sec. 4, subd. 2."

State v. Carson Carbon Co., 111 So. 162, 162 La. 781.

[fol. 41]

L.S.A.-R.S. 14:59 (6) Deprives Defendants of Equal Protection of the Law in That It Excludes From Its Provisions of a Certain Class of Citizens, Namely Those Who at the Time Are Active With Others in Furtherance of Certain Union (Labor) Activities?

The court is unable to relate this contention to the provisions of L.S.A.-R.S. 14:59(6), or the bill of information filed thereunder.

No where in the statute is any reference made to labor union activities, nor does the statute make any exceptions

or exclusions as to any persons or class of citizens, labor unions, or otherwise. It is probable that defendants have erroneously confused these proceedings with a charge under L.S.A.-R.S. 14:103 (Disturbance of the Peace.)

The Defendants Are Being Deprived of Their Rights Under the "Equal Protection and Due Process" Clauses of Both the Constitution of Louisiana and of the United States of America, in That the Said Law Under Which the Bill of Information Is Founded Is Being Enforced Against Them Arbitrarily, Capriciously and Discriminately, in That It Is Being Applied and Administered Unjustly and Illegally, and Only Against Persons of the Negro Race and/or White Persons Who Act in Concert With Members of the Negro Race?

The prosecution of defendants is in the name of the State of Louisiana, through the District Attorney for the Parish of Orleans. This officer is vested with absolute discretion as is provided by L.S.A.-R.S. 15:17.

It reads as follows:

> "The district attorney shall have entire charge and control of every criminal prosecution instituted or pending in any parish wherein he is district attorney, and shall determine whom, when, and how he shall prosecute, etc."

In the case of State v. Jourdain, 74 So. 2d. 203, 225 La. 1030, it was claimed in a motion to quash that the narcotic law was being administered by the New Orleans Police Department and the District Attorney's Office in a manner calculated to deprive the defendant of the equal protection [fol. 42] of the law, and in violation of Section 1 of the 14th. Amendment of the Constitution of the United States, in that these officials were actively prosecuting the infraction in this case, whereas they refrained from prosecuting other violations of the narcotic act of a more serious nature.

In sustaining the trial court's ruling, Your Honors said:

> "The claim is untenable. Seemingly, it is the thought of counsel that the failure of the Police Department and the District Attorney to offer appellant immunity,

if he would become an informer, operates as a purposeful discrimination against him and thus denies him an equal protection of the law. But, if we conceded that the police and the district attorney have failed to prosecute law violators who have agreed to become informers, this does not either constitute an unlawful administration of the statute or evidence an intentional or purposeful discrimination against appellant. The matter of the prosecution of any criminal case is within the entire control of the district attorney (R.S. 15:17) and the fact that not every violator has been prosecuted is of no concern of appellant, in the absence of an allegation that he is a member of a class being prosecuted solely because of race, religion, color or the like, or that he alone is the only person who has been prosecuted under the statute. Without such charges his claim cannot come within that class of unconstitutional discrimination which was found to exist in Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 and McFarland v. American Sugar Ref. Co., 241 U. S. 79, 60 L. Ed. 899, 36 S. Ct. 498. See Snowden v. Hughes, 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397, and cases there cited."

[fol. 43] In the case of City of New Orleans versus Dan Levy, et. al., 233 La. 844, 98 So. 2d. 210, Justice McCaleb in concurring stated:

"I cannot agree that the City of New Orleans and the Vieux Carre Commission are or have been applying the ordinances involved with "an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances" (see Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 1073, 30 L. Ed. 220) and have thus denied to appellant an equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.'

The sum and substance of appellant's charges is that his constitutional rights have been violated since many other similar or more severe violations of the

city ordinances exist and that the city officials have permitted such violations by not taking any action to enforce the law. These complaints, even if established, would not be sufficient in my opinion to constitute an unconstitutional denial of equal protection to appellant as it is the well-settled rule of the Supreme Court of the United States and all other state courts of last resort that the constitutional prohibition embodied in the equal protection clause applies only to discriminations which are shown to be of an intentional, purposeful, or systematic nature. Snowden v. Hughes, 321 U. S. 1, 9, 64 S. Ct. 397, 88 L. Ed. 497, 503; Charleston Federal Savings & Loan Ass'n. v. Alderson, 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857; City of Omaha v. Lewis & Smith Drug Co., 156 Neb. 650, 57 N. W. 2d. 269; Zorach v. Clauson, 303 N. Y. 161, 100 N. E. 2d. 463; 12 Am. Jur. Section 566 and State v. Anderson, 206 La. 986, 20 So. 2d. 288.

In State v. Anderson, this court quoted at length from the leading case of Snowden v. Hughes, supra, (321 U. S. 1, 9, 64 S. Ct. 401) where the Supreme Court of the United States expressed at some length the criteria to be used in determining whether an ordinance or statute, which is claimed to have been unequally administered, transgresses constitutional rights. The Supreme Court said:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, cf. McFarland v. American Sugar Refining Co., 241 U. S. 79, 86, 87, 36 S. Ct. 498, 501, 60 L. Ed. 899 (904), or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. Yick Wo v. Hopkins, 118 U. S. 356, 373, 374, 6 S. Ct.

1064, 1072, 1073, 30 L. Ed. 220 (227, 228). But a discriminatory purpose is not presumed. Tarrance v. State of Florida, 188 U. S. 519, 520, 23 S. Ct. 402, 403, 47 L. Ed. 572 (573); there must be a showing of 'clear and intentional discrimination', Gundling v. City of Chicago, 177 U. S. 183, 186, 20 S. Ct. 633, 635, 44 L. Ed. 725 (728); see Ah Sin v. Wittman, 198 U. S. 500, 507, 508, 25 S. Ct. 756, 758, 759, 49 L. Ed. 1142 (1145, 1146); Bailey v. State of Alabama, 219 U. S. 219, 231, 31 S. Ct. 145, 147, 55 L. Ed. 191 [fol. 44] (197). Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. Neal v. State of Delaware, 103 U. S. 370, 394, 397, 26 L. Ed. 567 (573, 574); Norris v. State of Alabama, 294 U. S. 587, 589k, 55 S. Ct. 579, 580, 79 L. Ed. 1074 (1076); Pierre v. State of Louisiana, 306 U. S. 354, 357, 59 S. Ct. 536, 538, 83 L. Ed. 757 (759); Smith v. State of Texas, 311 U. S. 128, 130, 131, 61 S. Ct. 164, 165, 85 L. Ed. 84 (86, 87); Hill v. State of Texas, 316 U. S. 400, 404, 62 S. Ct. 1159, 1161, 86 L. Ed. 1559 (1562). But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. State of Va. v. Rives, 100 U. S. 313, 322, 323, 25 L. Ed. 667 (670, 671); Martin v. State of Texas, 200 U. S. 316, 320, 321, 26 S. Ct. 338, 339, 50 L. Ed. 497 (499); Thomas v. State of Texas, 212 U. S. 278, 282, 29 S. Ct. 393, 394, 53 L. Ed. 512 (514); cf. Williams v. State of Mississippi, 170 U. S. 213, 225, 18 S. Ct. 583, 588, 42 L. Ed. 1012 (1016).

"Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination which may be evidenced, for example, by a systematic under-valuation

of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of the law is the same as though the discrimination were incorporated in and proclaimed by the statute. Coulter v. Louisville & N. R. Co., 196, U. S. 599, 608, 609, 610, 25 S. Ct. 342, 343, 344, 345, 49 L. Ed. 615 (617, 618); Chicago B & Q R Co. v. Babcock, 204 U. S. 585, 597, 27 S. Ct. 326, 328, 51 L. Ed. 636 (640); Sunday Lake Iron Co. v. Wakefield Twp., 247 U. S. 350, 353, 38 S. Ct. 495, 62 L. Ed. 1154 (1156); Southern R. Co. v. Watts, 260 U. S. 519, 526, 43 S. Ct. 192, 195, 67 L. Ed. 375 (387). Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though it is neither systematic nor long continued. Cf. McFarland v. American Sugar Refining Co. (241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899) supra.

"The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the approbrious epithets 'willful' and 'malicious' . . . . . "

[fol. 45] On rehearing in the Levy Case, Mr. Justice Simon, speaking for the Court said:

"In the instant case there is no proof that in the enforcement of the municipal zoning and Vieux Carre ordinances that the City acted with a deliberate discriminatory design, intentionally favoring one individual or class over another. It is well accepted that a discriminatory purpose is never presumed and that the enforcement of the laws by public authorities vested, as they are with a measure of discretion will, as a rule, be upheld."

Applying the cases herein cited, to the proof adduced by defendants in support of their claim of unjust, illegal, and discriminatory administration of L.S.A.-R.S. 14:59 (6), defendants have failed to sustain their burden.

The claim is without merit.

L.S.A.-R.S. 14:59(6) Under Which the Defendants Are Charged Is Unconstitutional and in Contravention of the 14th Amendment of the Constitution of the United States, and in Contravention of the Constitution of Louisiana, in That It Was Enacted for the Specific Purpose and Intent to Implement and Further the State's Policy of Enforced Segregation of Races?

This contention of defendants is without merit.

Certainly under its police power the legislature of the state was within its rights to enact L.S.A.-R.S. 14:59(6).

What motives may have prompted the enactment of the statute is of no concern of the courts. As long as the legislature complied with the constitutional mandate concerning legislative powers and authority, this was all that was required.

> "It has been uniformly held that every reasonable doubt should be resolved in favor of the constitutionality of legislative acts. We said in State ex rel. Know v. Board of Supervisors of Grenada County, 141 Miss. 701, 105 So. 541, in a case involving Section 175 of the Mississippi Constitution, that if systems (acts) of the kind here involved are evil, or if they destroy local government in the counties and municipalities, that is a question to be settled at the ballot boxes between the people and the Legislature. And whether the law is needed or not, or whether it is wise or not, cannot be settled here. Our functions are to decide whether the Legislature had the power to act in passing the law and not whether it ought to have acted in the manner it did. The court will uphold the constitution in the fullness of its protection, but it will not and cannot rightfully control the [fol. 46] discretion of the Legislature within the field assigned to it by the Constitution."
>
> State of Mississippi ex rel. Joe T. Patterson, Attorney General v. Board of Supervisors of Prentiss County, Miss. 105 So. 2d. 154. (Mississippi)

"The state, in the brief of its counsel, argues: 'If we assume that R. S. 58:131 et sequor must be fol-

lowed—then there can be no enforcement of the fish and game laws by the criminal courts. Only a $25 penalty can be inflicted against a person who is apprehended for wilfully killing a doe deer. Certainly this small 'civil' penalty will not deter willful game violators and our deer population will soon be decimated. * * * Whether the prescribed civil proceeding with its attendant penalty militates against adequate wild life protection is not for the courts' determination. The question is one of policy which the lawmakers must resolve."

State v. Coston, 232 La. 1019, 95 So. 2d. 641.

"We should also retain in our thinking the proposition that the regulation and control of the alcoholic beverage business is peculiarly a legislative function. In this connection, as in all similar situations, when the legislative branch of the government exercises a legislative power in the form of a duly enacted statute or ordinance it is not the function of a court to explore the wisdom or advisability of the enactment in order to bring its enforcement into question. To this end the limits of the court's authority is to measure the validity of the legislative enactment by the requirements of the controlling law. If those standards are met the legislation should be upheld. Somlyo v. Schott, supra."

State v. Cochran, 114 So. 2d. 797 (Fla.)

"In Morgan County v. Edmonson, 238 Ala. 522, 192 So. 274, 276, we said:

'It is of course a well settled rule that in determining the validity of an enactment, the judiciary will not inquire into the motives or reasons of the Legislature or the members thereof. 16 C.J.S., Constitutional Law, pp. 154, p. 487. 'The judicial department cannot control legislative discretion, nor inquire into the motives of legislators.' City of Birmingham v. Henry, 234 Ala. 239, 139 So. 283. See also, State ex rel. Russum v. Jefferson County Commission, 224 Ala. 229, 139 So. 243; * * *

It is our solemn duty to uphold a law which has [fol. 47] received the sanction of the Legislature, unless we are convinced beyond a reasonable doubt of its unconstitutionality. Yielding v. State ex rel. Wilkinson, 232 Ala. 292, 167 So. 580."

State v. Hester, 72 So. 2d. 61 (Ala.)

"Another factor which fortifies our view is this: the act assaulted is a species of social legislation, that is, a field in which the legislative power is supreme unless some specific provision of organic law is transgressed. Absent such transgression it is for the legislature and not the courts to determine what is "unnecessary, unreasonable, arbitrary and capricious". Requiring hotels, motels, and other rooming houses to advertise full details of room charges if they exercise that medium is certainly a legislative prerogative with which the courts have no power to interfere. A legislative finding that such a requirement is in the public interest concludes the matter."

Adams v. Miami Beach Hotel Association, 77 So. 2d. 465, (Fla.)

"Statute is not unconstitutional merely because it offers an opportunity for abuses."

James v. Todd (Ala) 103 So. 2d. 19. Appeal dismissed 79 S. Ct. 288, 358 U.S. 206, 3 L. Ed. 2d. 235.

"Validity of law must be determined by its terms and provisions, not manner in which it might be administered, operated or enforced."

Clark v. State (Miss) 152 So. 820.

"The state legislature is unrestricted, save by the state or federal constitution, and a statute passed by it, in the exercise of the powers, the language of which is plain, must be enforced, regardless of the evil to which it may lead."

State v. Henry (Miss) 40 So. 152, 5 L.R.A. N. S. 340.

"If the power exists in the legislative department to pass an act, the act must be upheld by the court,

even though there may be a possibility of administration abuse."

Stewart v. Mack (Fla) 66 So. 2d. 811.

"The gravamen of the offense denounced by section 3403 is the entry by one upon the enclosed land or premises of another occupied by the owner or his employees after having been forbidden to enter, or not having been previously forbidden refusing to depart therefrom after warned to do so."

* * * * * * *

"It is contended that the statute is invalid because [fol. 48] it is apparent that its terms are for the protection of the lessor in the enjoyment of his property. Conceding that to be true, we find no reason for the deduction that the statute is therefore invalid. All statutes against trespass are primarily for the protection of the individual property owner, but they are also for the purpose of protecting society against breaches of the peace which might occur if the owner of the property is required to protect his rights by force of arms."

Coleman, Sheriff v. State ex rel. Carver (Fla.) 161 So. 89.

L.S.A.-R.S. 14:59(6) Exceeds the Police Power of the State, in That It Has No Real, Substantial or Rational Relation to the Public Safety, Health, Morals, or General Welfare, But Has for Its Purpose and Object, Governmentally Sponsored and Enforced Separation of Races, Thus Denying Defendants Their Rights Under the First, Thirteenth, and Fourteenth Amendments to the United States Constitution, and Article 1, Section 2 of the Louisiana Constitution.

The Refusal to Give Service Solely Because of Race, the Arrest and Subsequent Charge Are All Unconstitutional Acts in Violation of the 14th Amendment of the United States Constitution, in That the Act of the Company's Representative Was Not the Free Will Act of a Private Individual, But Rather an Act Which Was Encouraged,

Fostered and Promoted by State Authority in Support of a Custom and Policy of Enforced Segregation of Race at Lunch Counters?

The Arrest, Charge and Prosecution of the Defendants Are Unconstitutional, in That It Is the Result of State and Municipal Action, the Practical Effect of Which Is to Encourage and Foster Discrimination by Private Parties?

The Court has grouped together for discussion the propositions hereinabove enumerated as they appear to be related to each other in the sum total of defendants complaint of the unconstitutionality of L.S.A.-R.S. 14:59(6).

There is presently no anti-discrimination statute in Louisiana, Sections 3 and 4 of Title 4 of the Revised Statutes having been repealed by Act 194 of 1954. Nor is there any legislation compelling the segregation of the races in restaurants, or places where food is served.

As authority supporting the constitutionality of L.S.A.-R.S. 14:59(6), the following cases are cited:

[fol. 49] In the case of State v. Clyburn, et. al., (N.C.) 1958, 101 S.E. 2d. 295, the defendants, a group of Negroes led by a minister, entered a Durham, North Carolina, ice cream and sandwich shop which was separated by a partition into two parts marked "White" and "Colored". They proceeded to the portion set apart for white patrons and asked to be served. Service was refused and the proprietor asked them to leave, or to move to the section marked "Colored". The minister asserted religious and constitutional bases for remaining. A city police officer placed them under arrest. The defendants were tried and convicted on warrants charging violation of state statutes which impose criminal penalties upon persons interfering with the possession of privately-held property. On appeal the Supreme Court of North Carolina affirmed the conviction. Finding no "state action" within the prohibition of the Fourteenth Amendment, the Court held that the constitutional rights of defendants had not been infringed by refusing them service or by their subsequent (sic)

In resolving the question, "Must a property owner engaged in a private enterprise submit to the use of his property to others simply because they are members of a different race," the Supreme Court of North Carolina said:

> "The evidence shows the partitioning of the building and provision for serving members of the different races in differing portions of the building was the act of the owners of the building, operators of the establishment. Defendants claim that the separation by color for service is a violation of their rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.
>
> * * * * * * *
>
> "Our statutes, G. S. Para. 14-126 and 134, impose criminal penalties for interfering with the possession or right of possession of real estate privately held. These statutes place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. Race confers no prerogative on the intruder; nor does it impair his defense.
>
> The Fourteenth Amendment to the Constitution of the United States created no new privileges. It merely [fol. 50] prohibited the abridgment of existing privileges by state action and secured to all citizens the equal protection of the laws.
>
> Speaking with respect to rights then asserted, comparable to rights presently claimed, Mr. Justice Bradley, in the Civil Rights Cases, 109 U. S. 3, 3 S.Ct. 18, 21, 27 L. Ed. 835, after quoting the first section of the Fourteenth Amendment, said: 'It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It

nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere brutum fulmen the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.

In United States v. Harris, 106 U. S. 629, 1 S. Ct. 601, 609, 27 L. Ed. 290, the Court, quoting from United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588 said: 'The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not

add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. The power of the national government is limited to this guaranty."

More than half a century after these cases were decided the Supreme Court of the United States said in Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d. 441: "Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S.Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action [fol. 51] inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." This interpretation has not been modified: Collins v. Hardyman, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253; District of Columbia v. Thompson Co., 346 U.S. 100, 73 S. Ct. 1007, 97 L. Ed. 1480; Williams v. Yellow Cab Co., 3 Cir. 200 F. 2d. 302, certiorari denied Dargan v. Yellow Cab Co., 346 U. S. 840, 74 S. Ct. 52, 98 L. Ed. 364.

Dorsey v. Stuyvesant Town Corp., 299 N. Y. 512, 87 N. E. 2d. 541, 14 A. L. R 2d. 133, presented the right of a corporation, organized under the New York law to provide low cost housing, to select its tenants, with the right to reject on account of race, color, or religion. The New York Court of Appeals affirmed the right of the corporation to select its tenants. The Supreme Court of the United States denied certiorari, 339 U. S. 81, 70 S. Ct. 4019, 94 L. Ed. 1385.

The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this

nation. Madden v. Queens County Jockey Club, 269 N. Y. 249, 72 N. E. 2d. 697, 1 A. L. R. 2d. 1160; Terrell Wells Swimming Pool v. Rodriguez Tex. Civ. App. 182 S. W. 2d. 824; Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589, 24 L. R. A., N. S. 447; Younger v. Judah, 111 Mo. 303, 19 S. W. 1109; Goff v. Savage, 122 Wash. 194, 210 P. 374, De La Ysla v. Publix Theatres Corporation, 82 Utah 598, 26 P. 2d. 818; Brown v. Meyer Sanitary Milk Co., 150 Kan. 931, 96 P. 2d. 651; Horn v. Illinois Cent. R. Co., 327 Ill. App. 498, 64 N. E. 2d. 574; Coleman v. Middlestaff, 147 Cal. App. 2d. Supp. 833, 305 P. 2d. 1020; Fletcher v. Coney Island, 100 Ohio App. 259, 136 N. E. 2d. 344; Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. 2d. 906. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants.

The fact that the propietors of the ice cream parlor contributed to the support of local government and paid a license or privilege tax which license contained no restrictions as to whom the proprietors could serve cannot be construed to justify a trespass, nor is there merit in the suggestion that the complaint on which the warrant of arrest issued, signed by an officer charged with the duty of enforcing the laws, rather than by the injured party, constituted state action denying privileges guaranteed to the defendants by the Fourteenth Amendment. The crime charged was committed in the presence of the officer and after a respectful request to desist. He had a right to arrest. G.S. Par. 15-41.

Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 85 L. Ed. 1368; and State v. Scoggin, 236 N. C. 19, 72 S. E. 2d. 54, cited and relied upon by defendants, appellants, to support their position, have no factual analogy to this case. Nothing said in those cases in any way supports the position taken by defendants in this case.

[fol. 52] In the case of Browning vs. Slenderella Systems of Seattle, (Wash.) (1959), 341 P. 2d. 859, two justices of the Supreme Court of Washington dissented in a ruling of

that court holding a reducing salon came within the purview of an Anti-Discrimination Statute of that State.

In this dissent it was said:

> "Because respondent is a Negress, the Slenderella Systems of Seattle, a private enterprise, courteously refused to give her a free reducing treatment, as advertised. She thereupon became abusive and brought this civil action for the injury to her feelings caused by the racial discrimination.
>
> This is the first such action in this state. In allowing respondent to maintain her action, the majority opinion has stricken down the constitutional right of all *private* individuals of every race to choose with whom they will deal and associate in their *private* affairs.
>
> No sanction for this result can be found in the recent segregation cases in the United States supreme court involving Negro rights in public schools and public busses. These decisions were predicated upon section 1 of the fourteenth amendment to the United States constitution, which reads:
>
> 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the *privileges* or *immunities* of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal* protection of the laws." (Italics mine.)

In the pre-Warren era, the courts had held that the privileges of Negroes under the fourteenth amendment, supra, were not *abridged* if they had available to them public services and facilities of *equal quality* to those enjoyed by white people. The Warren antisegregation rule abandoned that standard and substituted the unsegregated enjoyment of public services and facilities as the sole test of Negro equality before the law in such public *institutions*.

The *rights* and *privileges* of the fourteenth amendment, supra, as treated in the segregation decisions and as understood by everybody, related to *public institutions* and *public utilities* for the obvious reason that no person, whether white, black, red, or yellow, has any right whatever to compel another to do business with him in his *private* affairs.

No public institution or public utility is involved in the instant case. The Slenderella enterprise was not established by law to serve a public purpose. It is not a *public* utility with monopoly prerogatives granted to it by franchise in exchange for an unqualified obligation to serve everyone alike. Its employees are not public servants or officers. It deals in *private personal services*. Its business, like most service trades, is conducted pursuant to informal contracts. The (sic) [fol. 53] is the consideration for the service. It is true the contracts are neither signed, sealed, nor reduced to writing. They are contracts, nevertheless, and, as such, must be voluntarily made and are then, and only then, mutually enforceable. Since either party can refuse to contract, the respondent had no more right to compel service than Slenderella had to compel her to patronize its business.

There is a clear distinction between the non-discrimination enjoined upon a public employee in the discharge of his official duties, which are prescribed by laws applicable to all, and his unlimited freedom of action in his private affairs. There is no analogy between a public housing project operated in the government's proprietary capacity, wherein Negroes have equal rights, and a private home where there are no public rights whatever and into which even the King cannot enter.

No one is obliged to rent a room in one's home; but, if one chooses to operate a boarding house therein, it can be done with a clientele selected according to the taste or even the whim of the landlord. This right of discrimination in private businesses is a constitutional one.

The ninth amendment of the United States constitution specifically provides:

> 'The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.'

All persons familiar with the rights of English speaking peoples know that their liberty inheres in the scope of the individual's right to make uncoerced choices as as to what he will think and say; to what religion he will adhere; what occupation he will choose; where, when, how and for whom he will work, and generally to be free to make his own decisions and chooses his course of action in his private civil affairs. These constitutional rights of lawabiding citizens are the very essence of American liberties. For instance, they far outweigh in importance the fifth amendment to the United States constitution which excuses criminals from giving evidence against themselves. It was, in fact, an afterthought. Our constitutional forefathers were chiefly concerned with the rights of honest men. They would have specified their rights with the same particularity that they did in regard to criminals if they had foreseen that courts would become unfamiliar with them.

Cash registers ring for a Negro's as well as for a white man's money. Practically all American businesses, excepting a few having social overtones or involving personal services, actively seek Negro patronage for that reason. The few that do not serve Negroes adopt that policy either because their clientele insist upon exclusiveness, or because of the reluctance of employees to render intimate personal service to Negroes. Both the clientele and the business operator have a constitutional right to discriminate in their private affairs upon any conceivable basis. The right to exclusiveness, like the right to privacy, is essential to freedom. No one is legally aggrieved by its exercise.

[fol. 54] No sanction for destroying our most precious heritage can be found in the *criminal* statute cited by the majority opinion. It does not purport to

create a civil cause of action. The statute refers to "places of *public* resort". (Italics mine). This phrase is without constitutional or legal significance. It has no magic to convert a *private* business into a governmental institution. If one man a week comes to a tailor shop, it is a place of *public resort*, but that does not make it a public utility or public institution, and the tailor still has the right to select his private clientele if he chooses to do so. As a matter of fact, the statute in question is not even valid as a criminal statute. Obviously, this is not the occasion, however, to demonstrate its unconstitutionality.

The majority opinion violates the thirteenth amendment to the United States constitution. It provides, inter alia:

> 'Neither slavery *nor involuntary servitude* • • • shall exist within the United States • • •" (Italics mine)

Negroes should be familiar with this amendment. Since its passage, they have not been compelled to serve any man against their will. When a white woman is compelled against her will to give a Negress a Swedish massage, that too is involuntary servitude. Henderson v. Coleman, 150 Fla. 185, 7 So. 2d. 177.

Through what an arc the pendulum of Negro rights has swung since the extreme position of the Dred Scott decision: Those rights reached dead center when the thirteenth amendment to the United States constitution abolished the ancient wrong of Negro slavery. This court has now swung to the opposite extreme in its opinion subjecting white people to "involuntary servitude" to Negroes. I dissent."

In the case of Williams versus Howard Johnson's Restaurant, (Va.) (1959), U. S. C. A. 4th Cir., F. 2d. 845, a Negro attorney brought a class action in federal court against a restaurant located in Alexandria, Virginia seeking a declaratory judgment that a refusal to serve him because of race, violated the Civil Rights Act of 1875, etc.

An appeal, the Court of Appeals for the Fourth Circuit affirmed the lower court's dismissal for want of jurisdiction

and failure to state a cause of action, on the ground that defendant's restaurant, could refuse service to anyone, not being a facility of interstate commerce, and that the Civil Rights Act of 1875, did not embrace actions of individuals. Further, that as an instrument of local commerce, it was [fol. 55] at liberty to deal with such persons as it might select.

The court said:

> "Sections 1 and 2 of the Civil Rights Act of 1875, upon which the plaintiff's position is based in part, provided that all persons in the United States should be entitled to the full and equal enjoyment of accommodations, advantages, facilities and privileges of inns, public conveyances and places of amusement, and that any person who should violate this provision by denying to any citizen the full enjoyment of any of the enumerated accommodations, facilities or privileges should for every such offense forfeit and pay the sum of $500 to the person aggrieved. The Supreme Court of the United States, however, held in Civil Rights Cases, 109 U. S. 3, that these sections of the Act were unconstitutional and were not authorized by either the Thirteenth or Fourteenth Amendments of the Constitution. The court pointed out that the Fourteenth Amendment was prohibitory upon the states only, so as to invalidate all state statutes which abridge the privileges or immunities of citizens of the United States or deprive them of life, liberty or property without due process of law, or deny to any person the equal protection of the laws; but that the amendment did not invest Congress with power to legislate upon the actions of individuals, which are within the domain of state legislation. The Court also held that the question whether Congress might pass such a law in the exercise of its power to regulate commerce was not before it, as the provisions of the statute were not conceived in any such view (109 U. S. 19). With respect to the Thirteenth Amendment, the Court held that the denial of equal accommodations in inns, public conveyances and places of amusement does not impose the badge

of slavery or servitude upon the individual but, at most infringes rights protected by the Fourteenth Amendment from state aggression. It is obvious, in view of that decision, that the present suit cannot be sustained by reference to the Civil Rights Act of 1875.

The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restaurants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibits the states from making or enforcing any law abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the state which requires the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasizes the long established local custom of excluding Negroes from public restaurants and he contends that the acquiescence of the state in these practices amounts to discriminatory state action which falls within the condemnation of the Constitution. The essence of the argument is that the state licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.

This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of state law they do [fol. 56] not furnish a basis for the pending complaint. The license laws of Virginia do not fill the void. Section 35-26 of the Code of Virginia, 1950, makes it unlawful for any person to operate a restaurant in the state without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect

the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of the state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in Shelly v. Kraemer, 334 U. S. 1; 68 S. Ct. 836, 842:

> 'Since the decision of this court in the Civil Rights Cases, 1883, 109 U. S. 3 * * * the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only such action as may fairly be said to be that of the states.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. (Emphasis supplied.)"

In the case of State of Maryland versus Drews, Et. Als., Cir. Court for Baltimore Co. (May 6, 1960), (Race Relations Law Reporter, Vol. 5, No. 1, Summer—1960) five persons, three white and two Negro, were prosecuted in the Baltimore County, Maryland Circuit Court on the statutory charge of disturbing the peace. It was found that defendants had on the date of their arrest entered an amusement park owned by a private corporation, which unknown to defendants, had a policy of not serving colored persons. A special officer employed by the corporate owners informed defendants of the policy and asked the two colored defendants to leave. When they refused, all five defendants were requested to leave, but all refused. Baltimore County police who were then summoned to the area repeated the requests; but defendants again refused to leave; that over the physical resistance of defendants, they were arrested and removed from the premises.

The Court held: (1) that the park owner, though corporately chartered by the state and soliciting public patronage, could 'arbitrarily restrict (the park's) use to invitees of his selection' etc. * * * (3) that such action occurred in a 'place of public resort or amusement' within terms of the statute allegedly violated, the quoted phrase clearly

applying to all places where some segment of the public habitually gathers, and not merely to publicly-owned places where all members of the public without exception are [fol. 57] permitted to congregate.

The Court said:

"The first question which arises in the case is the question whether an owner of private property to which substantial numbers of persons are invited has any right to discriminate with respect to persons invited thereon, that is to say, whether such owner may exercise his own arbitrary freedom of selection in determining who will be admitted to and who will be permitted to remain upon his property under circumstances where such private property is being used as a place of resort for amusement. This question has been clearly answered in the affirmative by the authorities. In Madden v. Queens County Jockey Club, 72 N. E. 2d. 697 (Court of Appeals of New York), it was said at Page 698:

'At common law a person engaged in a public calling such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service, * * * On the other hand, proprietors of private enterprise, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. * * *

'The common-law power of exclusion, noted above, continues until changed by legislative enactment.'

The ruling therein announced was precisely adopted in the case of Greenfield v. Maryland Jockey Club, 190 Md. 96, the Court of Appeals, stating at Page 102 of its opinion that:

'The rule that, except in cases of common carriers, innkeepers and similar public callings, one may chose his customers is not archaic.'

The Court of Appeals also carefully pointed out in the Greenfeld case that the rule of the common law is

not altered even in the case of a corporation licensed by the State of Maryland. The doctrine of the Madden and Greenfeld cases, supra, announced as existing under the common law, has been held valid, even where the discrimination was because of race or color. See Williams v. Howard Johnson Restaurant, 268 F. 2d. 845 (restaurant) (CCA 4th); Slack v. Atlantic White Tower Systems, Inc., No. 11073 U.S.D.C. for the District of Maryland, D. R. et. al. Thomsen, J. (restaurant); Hackley v. Art Builders, Inc., et al (U.S.D.C.) for the District of Maryland, D. R. January 16, 1960 (real estate development).

The right of an owner of property arbitrarily to restrict its use to invitees of his selection is the established law of Maryland. Changes in the rule of law conferring that right are for the legislative and not the judicial branch of government.

We pass then to the second question: Did such action occur at a place of public resort or amusement? This involves a determination of the legislative meaning of the expression "place of public resort or amusement". If the legislative intent was that the words were intended to apply only to publicly owned places [fol. 58] of resort or amusement, then, manifestly, the testimony would not support a conviction here. By the same token, if the expression was intended to apply only to places in which all members of the public without exception were authorized or permitted to congregate, again there would be no evidence to support conviction here. On the other hand, if the reasonable intent and purpose of the quote phrase was to prohibit disorderly conduct in a place where some segment of the public habitually gathers and congregates, the evidence would clearly justify a conviction.

The first suggested interpretation of the words must be rejected, because of the fact that the same statute uses the term 'public worship', and this fact utterly destroys a contention that the word 'public' has a connotation of public ownership because of our constitutional separation of church and state.

The second suggested interpretation is equally invalid, because its effect, in the light of the rule of law announced in the Greenfield case, supra, would be the precise equivalent of the first suggested interpretation of the phrase. Moreover, such an interpretation necessarily would mean that the police authorities would be powerless to prevent disorder or bring an end to conditions of unrest and potential disturbance where large numbers of the public may be in congregation. To suggest such an interpretation is to refute it.

In the opinion of this Court the statute has clear application to any privately owned place, where crowds of people other than the owner of the premises habitually gather and congregate, and where, in the interest of public safety, police authorities lawfully may exercise their function of preventing disorder. See Askew v. Parker, 312 P. 2d. 342 (California). See also State v. Lanouette, 216 N. W. 870 (South Dakota).

It is the conclusion of the Court that the Defendants are guilty of the misdemeanor charged."

In the case of Henry v. Greenville Airport Com., U. S. Dist. Court (1959) 175 F. Supp. 343, an action asserting federal jurisdiction on the basis of diversity of citizenship, general federal question, and as a class action under federal civil rights statutes was brought in a federal district court by a Negro against the Greenville, S. C., airport commission, members thereof, and the airport manager. The complaint alleged that the manager even though informed that plaintiff was in interstate traveler, ordered him to use a racially segregated waiting room. Plaintiff's motion for a preliminary injunction to restrain defendant from making distinctions based on color relative to services at the airport was denied in addition to other reasons, because it was not alleged that defendants had denied him [fol. 59] any right under color of state law. The allegation that defendants received contributions from 'the Government' to construct and maintain portions of the airport was also stricken because it was also held to have nothing to do with the claim that he had been deprived of a civil right under state law. Defendant's motion to dismiss was granted because plaintiff not having alleged that anything com-

plained of was done under color of a specified state law, failed to state a cause of action under Section 1343 of Title 28 and it being inferable from the complaint that he went into the waiting room in order to instigate litigation rather than in quest of waiting room facilities, he had no cause of action under Section 1981 of Title 42 which was said to place duties on Negroes equal to those imposed on white persons and to confer no rights on Negroes superior to those accorded white persons. It was emphasized that activities which are required by the state, must be distinguished from those carried out by voluntary choice by individuals in accordance with their own desires and social practices, the latter kind not being state action.

The court said:

> "The plaintiff speaks of discrimination without unequivocally stating any fact warranting an inference of discrimination. The nearest thing to an unequivocal statement in his affidavit is the asserted fact that the purported manager of the Greenville Air Terminal 'advised him that "we have a waiting room for colored folks over there". Preceding that statement plaintiff's affidavit contains the bald assertion that the manager 'ordered me out'. However, the only words attributed to the manager by the plaintiff hardly warrant any such inference or conclusion. A like comment properly should be made concerning the further assertion in plaintiff's affidavit that he 'was required to be segregated'. What that loose expression means is anyone's guess. From whom was he segregated? The affidavit does not say. Was he segregated from his family or from his friends, acquaintances or associates, from those who desired his company and he theirs? There is nothing in the affidavit to indicate such to be true. Was he segregated from people whom he did not know and who did not care to know him? The affidavit is silent as to that also. But suppose he was segregated from people who did not care for his company or association, what civil right of his was thereby invaded? If he was trying to invade the civil rights of others, an injunction might be more properly invoked against

him to protect their civil rights. I know of no civil or uncivil right that anyone has, be he white or colored, to deliberately make a nuisance of himself to the annoyance of others, even in an effort to create or [fol. 60] stir up litigation. The right to equality before the law, to be free from discrimination, invests no one with authority to require others to accept him as a companion or social equal. The Fourteenth Amendment does not reach that low level. Even whites, as yet, still have the right to choose their own companions and associates, and to preserve the integrity of the race with which God almighty has endowed them.

Neither in the affidavit nor in the complaint of the plaintiff is there any averment or allegation that whatever the defendants may have done to the plaintiff was done at the direction or under color of state law. It is nowhere stated in either what right the plaintiff claims was denied him under color of state law. A state law was passed in 1928 that 'created a Commission * * * to be known as Greenville Airport Commission'. That Commission consists of five members, two selected by the City Council of the City of Greenville, two by the Greenville County Legislative Delegation, and the fifth member by the majority vote of the other four. The Commission so created is 'vested with the power to receive any gifts or donations from any source, and also to hold and enjoy property, both real and personal, in the County of Greenville, * * * *for the purpose of establishing and maintaining aeroplane landing fields* * * *; and to make such rules and regulations as *may be necessary in the conduct and operation of said aeroplane landing fields*". (Emphasis added). Further, the Act authorizes 'The City of Greenville * * * to appropriate and donate to said Commission such sums of money as it may deem expedient and necessary for the purpose aforesaid'. There is nothing in the Act that requires that Commission to maintain waiting rooms of any sort, segregated or unsegregated.

There is nothing in the affidavit or complaint of the plaintiff which could be tortured into meaning that the defendants had denied the plaintiff the use of the authorized airport landing fields. He had a ticket which authorized him to board a plane there. He was not denied that right. In fact there is no clear cut statement of any legal duty owed the plaintiff that defendants breached; and there is no showing that the plaintiff was damaged in any amount by anything done by the defendants, or by any one of them, under color of state law."

* * * * * * *

"The jurisdiction of this court is invoked by the plaintiff under Section 1343, Title 28, U. S. Code. It is appropriate, therefore, that we consider the extent of the jurisdiction that is therein conferred on this court. By it district courts are given jurisdiction of civil actions '* * * to redress the deprivation, under color of state law, * * * of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens * * *'. Hence we must look to the complaint to ascertain (1) what right plaintiff claims he has been deprived of, (2) secured by what constitutional provision or Act of Congress providing for equal rights of citizens, and (3) under color of what state law? It is not enough for the plaintiff to allege that he has been deprived of a right or a privilege. He must go further and show what right, or privilege, he has been deprived of, by what constitutional provision or [fol. 61] Act of Congress it is secured, and under color of what state law he has been deprived of his stated right. If the plaintiff fails to allege any one or more of the specified elements his action will fail as not being within the jurisdiction of this court.

As pointed out hereinabove, there is no allegation in the complaint that anything complained of was done under color of a specified state law. The Court has been pointed to no state law requiring the separation of the races in airport waiting rooms, and its own re-

search has developed none. Moreover, there is no state law that has been brought to the Court's attention, or that it has discovered, which requires the defendants, or anyone else, to maintain waiting rooms at airports, whether segregated or unsegregated. Hence the advice which it is alleged that the 'purported manager' of the Airport gave the plaintiff, saying 'we have a waiting room for colored folks over there,' could not have been given under color of a state law since there is no state law authorizing or commanding such action.

In connection with the tendered issue of the court's jurisdiction, plaintiff claims that he has a cause of action arising under Section 1981, Title 42, U. S. Code. It provides:

> 'All persons within the jurisdiction of the United States shall have the same right in every state * * * to the full and *equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind * * *' (Emphasis added).

The undoubted purpose of Congress in enacting Section 1981, was to confer on negro citizens rights and privileges equal to those enjoyed by white citizens and, at the same time, to impose on them like duties and responsibilities. The court's attention has been directed to no law that confers on any citizen, white or negro, the right or privilege of stirring up racial discord, of instigating strife between the races, of encouraging the destruction of racial integrity, or of provoking litigation, especially when to do so the provoker must travel a great distance at public expense.

It is inferable from the complaint that there were waiting room facilities at the airport, but whether those accorded the plaintiff and other negroes were inferior, equal or superior to those accorded white citizens is not stated. It is also inferable from the complaint that the plaintiff did not go to the waiting room

in quest of waiting room facilities, but solely as a volunteer for the purpose of instigating litigation which otherwise would not have been started. The Court does not and should not look with favor on volunteer trouble makers or volunteer instigators of strife or litigation. A significant feature of Section 1981, which by some is little noticed and often ignored, is that it places squarely on negroes obligations, duties and responsibilities equal to those imposed on white citizens, and that said Section does not confer on negroes rights and privileges that are superior and more abundant than those accorded white citizens.

[fol. 62] Williams v. Howard Johnson's Restaurant, et. al. argued before the Fourth Circuit Court of Appeals June 15, 1959, is in many respects similar to the instant case. As here, the plaintiff had a government job. He went from his place of public employment into the State of Virginia to demand that he be served in a restaurant known to him to be operated by its owner, the defendant, solely for white customers. He invoked the jurisdiction of the court both on its equity side and on its law side for himself and for other negroes similarly situated. The suit was dismissed by the district court. Upon the hearing it was conceded that no statute of Virginia required the exclusion of negroes from public restaurants. Hence the Fourteenth Amendment didn't apply. No action was taken by the defendant under color of state law. Notwithstanding the absence of a state law applicable to the situation, the plaintiff argued that the long established local custom of excluding negroes from white restaurants had been acquiesced in by Virginia for so long that it amounted to discriminatory state action. The Appellate Court disagreed, and so do I. As pointed out in Judge Soper's opinion in the Howard Johnson case, 'This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices.' Further Judge Soper said:

'The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in Shelly v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 842 (92 L. ED. 1161):

'Since the decision of this court in the Civil Rights Cases, 1883, 109 U. S. * * * the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only such action as may fairly be said to be that of the States.* That Amendment erects no shield against merely private conduct, however, discriminatory or wrongful.'" (Emphasis supplied)

To say that the right of one person ends where another's begins has long been regarded as a truism under our system of constitutional government. While the rights and privileges of all citizens are declared to be equal by our constitution there is no constitutional command that they be exercised jointly rather than severally; and, if there were such a constitutional command, the rights and privileges granted by the constitution would be by it also destroyed. A constitution so written or interpreted would be an anomaly."

In the case of Wilmington Parking Authority and Eagle Coffee Shoppe, Inc. versus Burton, (Del. - 1960) 157 A. 2d. 894, a Delaware Negro citizen was refused service because of race by a Wilmington restaurant located in a leased [fol. 63] space in a public parking building owned by the Wilmington Parking Authority, a state agency. He brought a class action in a state chancery court asking for a declaratory judgment that such discrimination violated the Fourteenth Amendment and for injunctive relief.

On appeal the state supreme court reversed the trial court.

The appellate court held the fundamental problem to be whether the state, directly or indirectly, 'in reality', created or maintained the facility at public expense or controlled its operation; for only if such was the case the Fourteenth Amendment would apply.

The court held that the Authority did not locate the restaurant within the building for the convenience and service of the public using the parking facilities and had not, directly or indirectly, operated nor financially enabled it to operate.

It was held the Authority's only concern in the restaurant —the receipt of rent which defrayed part of the operating expense of providing the public with off-street parking— was insufficient to make the discriminatory act that of the state. And the fact that the City of Wilmington had originally 'advanced' 15% of the facilities, cost (the balance being financed by an Authority bond issue) was held not to make the enterprise one created at public expense for 'slight contributions' were insufficient to cause that result.

Finally, it was held the fact that the leasee sold alcohol beverages did not make it an inn or tavern, which by common law must not deny service to any one asking for it; rather, it functioned primarily as a private restaurant, which by common law and state statute might deny service to anyone offensive to other customers to the injury of its business.

> "We think the case before us is distinguishable from the cases relied on by the plaintiff. In the first place, it is quite apparent, nor is there any suggestion to the contrary made by the plaintiff, that the establishment of a restaurant in the space occupied by Eagle is a pure happenstance and was not intended as a service to the public using the parking facility. As far as the record before us indicates, it was immaterial to the [fol. 64] Authority what type of business would occupy the space now occupied by Eagle. The Authority's sole interest was in the obtaining of money in the form of rent. That money is thereafter used by the Authority to support the public purpose of supplying off-street parking from which the plaintiff and the rest of the public benefit.
>
> It is further clear from this record, and from the Ranken case, that at no time did the Authority contemplate the establishment of a restaurant in the structure for the use of its parking patrons. On the contrary, the commercial lease entered into by the Authority

were given to the highest bidders in terms of rent after the solicitation of bids by public advertisement. The decision to lease to a particular lessee was made upon the considerations of the applicants' financial responsibility and the amount of rent agreed to be paid. It is thus apparent that this case completely lacks the element of furnishing service to the public through the means of a lease to private enterprise. The only purpose for this lease is to supply a portion of the additional money required to permit the Authority to furnish the only public service it is authorized to furnish, viz., public off-street parking.

The plaintiff argues that the use of public money to purchase a portion of the land required brings this case within the rule of the cited authorities. But we think not. At the most, approximately 15% of the total cost is represented by the public 'advance' of money. To accept the plaintiff's view would require us in all similar cases to measure the respective contributions made by public and private money and to determine at what point the public contribution changes the nature of the enterprise. It is obvious that there is no guide for judicial speculation upon such a change. If it is said that the contribution of any public money is sufficient to change the nature of the enterprise, the answer is that it has been held that a slight contribution is insufficient. Cf. Eaton v. Board of Managers, D. C. 164 F. Supp. 191.

Fundamentally, the problem is to be resolved by considerations of whether or not the public government, either directly or indirectly, in reality, is financing and controlling the enterprise which is charged with racial discrimination. If such is the case, then the Fourteenth Amendment applies; if it is not the case, the operators of the enterprise are free to discriminate as they will. Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 842, 91 L. Ed. 1161. We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public. We apply the law, whether or not that law follows the current fashion of social philosophy.

Particularly is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone.

We think the Authority and, through it, the State of Delaware does not operate, either directly or in- [fol. 65] directly, the business of Eagle; has not located the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern the Authority has with Eagle is the receipt of rent, without which it would be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the State of Delaware.

It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to every one. This is the common law, and the law of Delaware as restated in 24 Del C Par. 1501 with respect to restaurant keepers. 10 Am. Jur., Civil Rights PP 21, 22; 52 Am Jur. Theatres PP 9; Williams v. Howard Johnson's Restaurant, 4 Cir. 268 F. 2d. 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment.

Finally, plaintiff contends that 24 Del. C. PP 1501, has no application in the case at bar because Eagle, since it serves alcoholic beverages to its patrons, is a tavern or inn and not a restaurant. It is argued that,

at common law, an inn or tavern could deny services to no one asking for it. We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of 24 Del. C. PP 1501, which does not compel the operator of a restaurant to give service to all persons seeking such."

In the case of Slack v. Atlantic White Tower System, Inc., (U.S. Dist. Court, Maryland, 1960), 181 F. Supp. 124, a Negress, who because of race had been refused food service by a Baltimore, Maryland, restaurant (one of an interstate chain owned by a Delaware Corporation) brought a class action in federal court for declaratory judgment and injunctive relief against the corporate owner claiming that her rights under the constitution and laws of the United States had been thereby denied.

The court held that segregated restaurants in Maryland were not required by any state statute or decisional law, but were the result of individual proprietors business choice.

The court also rejected plaintiff's argument that defendant as a licensee of the state to operate a public restaurant, [fol. 66] had no right to exclude plaintiff from service on a racial basis; rather, the restaurant's common law right to select its clientele (even on a color basis), was still the law of Maryland.

Plaintiff's further contention that the state's admission of this foreign corporation and issuance of a restaurant license to it 'invests the corporation with a public interest' sufficient to make its racially exclusive action the equivalent of state action was likewise rejected, the court holding that a foreign corporation had the same rights as domestic business corporations, and that the applicable state license laws were not regulatory. And statements in white primary cases, that when individuals or groups "move beyond matters of merely private concern' and 'act in matters of high public interest" they become "representatives of the State" subject to Fourteenth Amendment restraints, were held inapposite to this type situation where defendant had not exercised any powers similar to those of a state or city.

The Court said:

"Plaintiff seeks to avoid the authority of Williams v. Howard Johnson's Restaurant, 4 Cir., 268 F. 2d 845, by raising a number of points not discussed therein, and by arguing that in Maryland segregation of the races in restaurants is required by the State's decisional law and policy, whereas, she argues, that was not true in Virginia, where the Williams case arose. She also contends that the Williams case was improperly decided and should not be followed by this Court.

• • • • • • •

Such segregation of the races as persists in restaurants in Baltimore is not required by any statute or decisional law of Maryland, nor by any general custom or practice of segregation in Baltimore City, but is the result of the business choice of the individual proprietors, catering to the desires or prejudices of their customers.

Plaintiff's next argument is that defendant, as a licensee of the State of Maryland operating a public restaurant or eating facility, had no right to exclude plaintiff from its services on a racial basis. She rests her argument on the common law, and on the Maryland license law.

In the absence of statute, the rule is well established that an operator of a restaurant has the right to select the clientele he will serve, and to make such selection based on color, if he so desires. He is not an innkeeper [fol. 67] charged with a duty to serve everyone who applies. Williams v. Howard Johnson's Restaurant, 268 F. 2d. at 847; Alpaugh v. Wolverton, 184 Va. 943; State v. Clyburn, 101 S. Ed. 2d. 295; and authorities cited in those cases. There is no restaurant case in Maryland, but the rule is supported by statements of the Court of Appeals of Maryland in Grenfeld v. Maryland Jockey Club, 190 Md. 96, 102, and in Good Citizens Community Protective Association v. Board of Liquor License Commissioners, 217 Md. 129, 131.

Art. 56, Secs. 151 et seq., of the Ann. Code of Md., 1939 ed. (163 et seq. of the 1957 ed.), deals with licenses required of persons engaged in all sorts of businesses. Secs. 166 (now 178) provides: 'Each person, firm or corporation, resident or non-resident, operating or conducting a restaurant or eating place, shall, before doing so take out a license therefor, and pay an annual license fee of Ten Dollars ($10.00) for each place of business so operated except that in incorporated towns and cities of 8,000 inhabitants or over, the fee for each place of business so operated shall be Twenty-Five Dollars ($25.00)'. The Attorney General of Maryland has said that 'A restaurant is generally understood to be a place where food is served at a fixed price to all comers, usually at all times.' This statement was made in an opinion distinguishing a restaurant from a boarding house for licensing purposes. 5 Op. Atty. Gen. 303. It was not intended to express opinion contrary to the common law right of a restaurant owner to choose his customers. The Maryland Legislature and the Baltimore City Council have repeatedly refused to adopt bills requiring restaurant owners and others to serve all comers regardless of race; several such bills are now pending. See Annual Report of Commission, January 1960, p. 29.

Plaintiff contends that defendant is engaged in interstate commerce, that its restaurant is an instrumentality or facility of interstate commerce and thus subject to the constitutional limitations imposed by the Commerce Clause (Const. Art. 1 sec. 8); and that defendant's refusal to serve plaintiff, a traveler in interstate commerce, constituted an undue burden on that commerce.

A similar contention was rejected in Williams v. Howard Johnson's Restaurant, 268 F. 2d. at 848. It would be presumptuous for me to enlarge on Judge Soper's opinion on this point.

'The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That Amendment

erects no shield against merely private conduct, however discriminatory or wrongful'. Shelley v. Kraemer, 334 U.S. 1, 13. Plaintiff seeks to avoid this limitation by arguing that the admission by the state of a foreign corporation and the issuance to it of a license to operate a restaurant 'invests the corporation with a public interest' sufficient to make its action in excluding patrons on a racial basis the equivalent of state action.

The fact that defendant is a Delaware corporation is immaterial. Once admitted to do business in the State of Maryland, it has the same rights and duties as domestic corporations engaged in the same business. This factor does not distinguish the case from Williams v. Howard Johnson's Restaurant, where the state action question was discussed at p. 847.

[fol. 68] The license laws of the State of Maryland applicable to restaurants are not regulatory. See Maryland Theatrical Corp. v. Brennan, 180 Md. 377, 381, 382. The City ordinance, No. 1145, November 27, 1957, adding Sec. 60½ to Art. 12 of the Baltimore City Code, 1950 ed., which was not offered in evidence or relied on by plaintiff, is obviously designed to protect the health of the community. Neither the statute nor the ordinance authorizes State or City officials to control the management of the business of a restaurant or to dictate what persons shall be served.

Even in the case of licensees, such as race tracks and taverns, where the business is regulated by the state, the licensee does not become a state agency, subject to the provisions of the Fourteenth Amendment. Madden v. Queen's County Jockey Club, 296 N. Y. 243, 72 N. E. 2d. 697, cert. den. 332 U. S. 761, cited with approval in Greenfeld v. Maryland Jockey Club, 190 Md. at 102; Good Citizens Community Protective Association v. Board of Liquor License Commissioners, 217 Md. 129. No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor

of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency. Plaintiff cites Valle v. Stengel, 3 Cir., 176 F. 2d. 697. In that case a sheriff's eviction of a negro from a private amusement park was a denial of equal protection of the laws because under the New Jersey antidiscrimination law the Negro had a legal right to use the park facilities.

Plaintiff cites such cases as Nixon v. Condon, 286 U.S. 73, and Smith v. Allwright, 321 U.S. 649, for the proposition that when individuals or groups 'move beyond matters of merely private concern' and 'act in matters of high public interest' they become 'representatives of the State' subject to the restraints of the Fourteenth Amendment. The distinction between holding a primary election and operating a restaurant is obvious, and has always been recognized by the courts. Defendant has not exercised powers similar to those of a state or city.

In Kerr v. Enoch Pratt Free Library of Baltimore City, 4 Cir., 149 F. 2d. 212, also relied on by plaintiff, 'the Library was completely owned and largely supported * * * by the City; * * * in practical effect its operations were subject to the City's control', as the Fourth Circuit pointed out in distinguishing the Library case from Eaton v. Board of Managers of the James Walker Memorial Hospital, 4 Cir., 261 F. 2d. 521, 527.

The argument that state inaction in the face of uniform discriminatory customs and practices in operating restaurants amounts to state action was rejected in Williams v. Howard Johnson's Restaurant, 4 Cir., 268 F. 2d. 845. Moreover, as we have seen, the factual premise for the argument is not found in the instant case."

[fol. 69] In the case of Fletcher versus Coney Island, Inc., (Ohio 1956), 134 N. E. 2d. 371, a Negro woman sought to enjoin the operator of a private amusement park from refusing her admittance because of her race or color.

In holding that defendant's remedy was to proceed under the State's anti-discrimination law, and not by way of injunction, the Supreme Court of Ohio said:

> "In the case of Madden v. Queens County Jockey Club, Inc., 296 N. Y. 249, 253, 72 N. E. 2d. 697, 698, 1 A. L. R. 2d. 1160, 1162, the generally recognized rule is stated as follows:
>
> 'At common law a person engaged in a public calling, such as an innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. * * * On the other hand, proprietors of private enterprises such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. * * *'
>
> *"The common-law power of exclusion, noted above, continues until changed by legislative enactment."* (Emphasis supplied.)
>
> "See also Bailey v. Washington Theatre Co., 218 Ind. 34 N. J. 2d. 17; annotation, 1 A. L. R. 2d. 1165; and 10 American Jurisprudence 915, Section 22."
>
> "It will be thus observed that the owner or operator of a private amusement park or place of entertainment may arbitrarily and capriciously refuse admittance to whomsoever he pleases, be they Africans, Chinese, East Indians, Germans, Italians, Poles, Russians or any other racial group, in the absence of legislation requiring him to admit them."
>
> * * * * * * * *
>
> "In summary, the decision in this case rests squarely on the proposition that at common law those who own and operate private places of amusement and entertainment can admit or exclude whomsoever they please; and that, since such establishments are open to all only through legislative enactments, those enactments govern the situation, and where as a part of those enactments a specific remedy or penalty is prescribed for their violation, such remedy or penalty is exclusive. The adequacy or appropriateness thereof being a mat-

ter of legislative concern. This decision is limited to this precise point and should be so read and appraised.'

"It should be obvious that the present case bears no relation whatsoever to the problem of the segregation of pupils in the public schools, or to the exclusion of a qualified person from an institution of higher learning [fol. 70] supported by public funds or a person from a publicly owned or operated park or recreation facility, because of his race or color."

In the case of Tamelleo, et al. v. New Hampshire Jockey Club, Inc., (N. H. 1960), 163 A. 2d. 10, the plaintiffs presented themselves at the defendant's race track but were refused admission by the action of one of defendant's agents who ordered them to leave the premises because in his judgment their presence was inconsistent with the orderly and proper conduct of a race meeting. The plaintiffs then left the premises and thereafter instituted these proceedings.

The court said:

"It is firmly established that at common law proprietors of private enterprises such as theatres, race tracks, and the like may admit or exclude anyone they choose. Woolcott v. Shubert, 217 N. Y. 212, 222, 111 N. E. 829, L. R. A. 1916 E. 248; Madden v. Queens County Jockey Club, 296 N. Y. 249, 72 N. E. 2d 697, certiorari denied 332 U.S. 761, 68 S. Ct. 63, 922 Ed. 346; 1 A.L.R. 2d 1165 annotation; 86 C.J.S. Theatres and shows, sec. 31. While it is true, as the plaintiffs argue and the defendants concede, that there is no common-law right in this state to operate a race track where pari-mutuel pools are sold, horse racing for a stake or price is not gaming or illegal. Opinion of the Justices, 73 N. H. 625, 631, 63 A. 505.

"However, the fact that there is no common-law right to operate a pari-mutuel race track is not decisive of the issue before us. The business is still a private enterprise since it is affected by no such public interest so as to make it a public calling as is a railroad

for example, Garifine v. Monmouth Park Jockey Club, 29 N. J. 47, 148 A. 2d. 1; Madden v. Queens County Jockey Club, supra. Regulation by the state does not alter the nature of the defendant's enterprise, nor does granting a license to conduct pari-mutuel pools. North Hampton Racing and Breeders Association v. New Hampshire Racing Commission, 94 N. H. 156, 159, 48 A. 2d. 472; Greenfeld v. Maryland Jockey Club, 190 Md. 96, 57 A. 2d. 335. As the North Hampton case points out, regulation is necessary because of the social problem involved. Id., 94 N. H. 159, 48 A. 2d. 475.

"We have no doubt that this state adheres to the general rule that the proprietors of a private calling possess the common-law right to admit or exclude whomever they choose. In State v. United States & C. Express, 60 N. H. 219, after holding that a public carrier cannot discriminate, Doe, C. J., stated, 'Others, in other occupations, may sell their services to some, *and refuse to sell to others.*'" Id. 60 N H 261." (Emphasis supplied.)

"In Batchelder v. Hibbard, 58 N. H. 269, the Court states that a license, sofar as future enjoyment is concerned, may be revoked any time. A ticket to a race track is a license and it may be revoked for any reason in the absence of a statute to the contrary. Marrone v. Washington Jockey Club, 227 U.S. 633, 33 S. Ct. 401, 61 L. Ed. 679."

* * * * * * *

[fol. 71] "The plaintiffs also contend that if this be our law, we should change it in view of altered social concepts. This argument ignores altogether certain rights of owners and taxpayers, which still exist in this state, as to their own property. Furthermore, to adopt the plaintiff's position would require us to make a drastic change in our public policy which, as we have often stated, is not a proper function of this court.

"The plaintiffs take the position that R.S.A. 284: 39, 40 as inserted by Laws 1959, c. 210, sec. 14, is invalid as an unconstitution delegation of legislative power. We cannot agree. Laws 1959, c. 210 is entitled:

'An act relative to Trespassing on Land of Another and at Race Tracks and Defining Cultivated Lands". Section 4 (R.S.A. 284:39, under the heading 'Trespassing' reads as follows: 'Rights of Licensee. Any licensee hereunder shall have the right to refuse admission to and to eject from the enclosure of any race track where is held a race or race meet licensed hereunder any person or persons whose presence within said enclosure is in the sole judgment of said licensee inconsistent with the orderly and proper conduct of a race meeting.' As applied to this case this provision is substantially declaratory of the common law which permits owners of private enterprises to refuse admission or to eject anyone whom they desire. Garfine v. Monmouth Park Jockey Club, 29 N. J. 47, 148 A.2d. 1.

"The penalty provision, section 4 (R.S.A. 284:40) states: 'Penalty. Any person or persons within said enclosure without right or to whom admission has been refused or who has previously been ejected shall be fined not more than one hundred dollars or imprisoned not more than one year or both.' This provision stands no differently than does that imposing a penalty upon one who enters without right the cultivated or posted land of another. R. S. A. 572:15 (supp) as amended. One charged with either of these offenses or with trespass at a race track would of course have a right to trial and the charge against him would have to be proved, as in any other criminal matter. No license to pass any law is given to the defendant. The situation is clearly unlike that condemned in Ferretti v. Jackson, 88 N. H. 296, 188 A. 474, and Opinion of the Justices, 88 N. H. 497, 190 A. 713, upon which the plaintiffs rely, where the milk board was given unrestricted and unguided discretion, in effect, to make all manners of laws within the field of its activity. It thus appears that there is no unlawful delegation of legislative powers in the present case."

In the case of Hall v. Commonwealth, (Va. 1948) 49 S. E. 2d. 369, Appeal Dismissed, See 69 S. Ct. 240), a Jehovah's Witness, was convicted for trespassing on pri-

vate property. He sought appellate relief on the ground that the conviction violated his right to freedom of speech, freedom of the press, freedom of assembly, and freedom of worship guaranteed to him by the Constitutions of the United States and the State of Virginia.

The court said:

[fol. 72] "The statute under which the accused was prosecuted is Chapter 165, Acts of 1934, sec. 4480a, Michie's 1942 Code, which provides: 'That if any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge or possession of such land he shall be deemed guilty of a misdemeanor, etc. • • •

• • • • • • •

"Mr. Justice Black in Martin v. City of Struthers, 319 U. S. 141, at page 147, 63 S. Ct. 862, at page 865, 87 L. Ed. 1313, speaking of this particular statute and other statutes of similar character, said: 'Traditionally the American Law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more.'

"We find nothing in the statute when properly applied which infringes upon any privilege or right guaranteed to the accused by the Federal Constitution."

• • • • • • •

"The most recent expressions of the Supreme Court of the United States on this subject are found in Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265, and Tucker v. Texas, 326 U. S. 517, 66 S. Ct. 274, 90 L. Ed. 274, both of which were decided by a divided court.

• • • • • • •

"In concluding the discussion the New York court said: 'Our purpose in this briefly analyzing those

decisions (Marsh v. Alabama and Tucker v. Texas) is to show that they do not (nor do any others of which we know) go nearly so far as appellants would have us go here. Parkchester, like Chickasaw, Alabama, and the Federal housing community in Texas, is privately owned, but there the similarity as to facts ends. It is undisputed that this defendant has never sought in any way to limit the Witnesses' activities on the streets or sidewalks of Parkchester some of which are privately and some publicly owned. The distribution which this defendant's regulation inhibits was not on the streets, sidewalks or other public or quasi-public places, but inside of and into, the several floors and inner hallways of multiple dwellings.'

* * * * * * *

"We think the Bohnke case, supra, is still the law and leaves solid the regulation of door-to-door calls along public streets. But regardless of the Bohnke ruling, no case we know of extends the reach of the bill of rights so far as to prescribe the reasonable regulation by an owner, of conduct inside his multiple dwelling. So holding, we need not examine the larger question of whether the pertinent clauses of the Constitutions have anything to do with rules made by any dwelling proprietors, governing conduct inside their edifices."

[fol. 73] In the case of State versus Hunter, 114 So. 76, 164 La. 405, 55 A. L. R. 309, Aff. Hunter v. State of La., 48 S. Ct. 158, 265 U. S. 508, 72 L. Ed. 398, the Supreme Court of Louisiana said:

"The defendant was convicted of the offense of going on the premises of a citizen of the state, in the nighttime, without his consent, and moving or assisting in moving therefrom a tenant and his property or effects. * * * The offense was a violation of the Act No. 38 of 1926, p. 52; which makes it unlawful to go on the premises or plantation of a citizen of this state, in the nighttime or between sunset and sunrise, without his consent, and to move or assist in moving therefrom any laborer or tenant. The act declares that it does not

apply to what is done in the discharge of a civil or military order."

* * * * * * *

"The defendant pleaded that the statute was violative of the guaranty in the second section of Article 4 of the Constitution of the United States that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and was violative also of the provision in the Fourteenth Amendment that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and violative of the due process clause and the equal protection clause of the Fourteenth Amendment."

* * * * * * *

"On the occasion referred to in the bill of information he, (defendant) went upon the plantation of one T. D. Connell, a citizen of Louisiana, in the nighttime and without Connell's consent and moved from the plantation to the state of Arkansas a tenant of Connell and the tenant's property or effects. The defendant was employed by Connell's tenant to do the hauling, and was not discharging any civil or military order. Some of the plantations in that vicinity were owned by citizens of Louisiana and some by persons not citizens of Louisiana. For several months previous to the occasion complained of the defendant was engaged in hauling persons and their property and effects, in the ordinary course of his business, and regardless of whether any of the persons moved were laborers or tenants on premises owned by a citizen of Louisiana or by a citizen of another state.

"The statute is not an unreasonable exercise of the police power of the state. It merely forbids a person having no right to be on the premises of another to go there in the nighttime and without the proprietor's consent—and therefore as a trespasser—and to move or assist in moving from the premises a laborer or tenant or his property or effects. The purpose of the statute, manifestly, is to preserve the right of every

landlord or employer of farm labor to be informed of the removal from his premises of any personal property or effects. Without a statute on the subject it would be unconventional in the rural districts, to say the least, for an outsider to take the liberty of going upon the premises of another in the nighttime to cart away personal property or effects, without the land-[fol. 74] owner's consent. The statute does not discriminate with regard to those who may or may not commit the act. It forbids all alike. The discrimination is in what is forbidden. It is not forbidden—by this particular statute—to trespass upon the land of one who is not a citizen of the state, by going upon his premises in the nighttime without his consent. Perhaps the Legislature used the word "citizen" not in its technical or political sense but as meaning a *resident* of the state, and perhaps the Legislature thought the law would be too harsh if it forbade those engaged in the transfer business to go upon premises belonging to a non-resident—even in the nighttime—without first obtaining his consent. The discrimination, therefore, is not arbitrary or beyond all possible reason. The defendant has no cause to complain that the Legislature did not go further, in enacting the law, and forbid a similar act of trespass upon the premises of a citizen of another state. If he had the right to complain of such discrimination, we would hold that the statute does not deprive the citizens of other states, owning land in this state, of any privilege or immunity guaranteed to the landowners who are citizens of this state. The privileges and immunities referred to in the second section of Article 4 of the Constitution of the United States are only those fundamental rights which all individuals enjoy alike, except insofar as they are all restrained alike. White v. Walker, 136 La. 464, 67 So. 332 Central Loan & Trust Co., v. Campbell Commission Co., 173 U. S. 84, 19 S. Ct. 346, 43 L. Ed. 623. If the trespass committed by the defendant in this case had been committed on land belonging to a citizen of another state, there would have been no violation of the Act No. 38 of 1926; and in that event

the citizen of the other state would have had no means of compelling the Legislature of this state to make the law applicable to his case, or right to demand that the courts should declare the law null because not applicable to his case. All of which merely demonstrates that the statute in question is not violative of the second section of Article 4 of the Constitution of the United States or of the due process clause or equal protection clause of the 14th. Amendment."

"These guarantees of freedom of religious worship, and freedom of speech and of the press, do not sanction trespass in the name of freedom. We must remember that personal liberty ends when the rights of others begin. The constitutional inhibition against the making of a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press does not conflict with the law which forbids a person to trespass upon the property of another."

State v. Martin, et als. 5 So. 2d. 377, 199 La. 39.

In support of their plea of unconstitutionality, defendants cite the cases of Shelley v. Kraemer, 334 U.S. 1, 20, 68 S. Ct. 836, 92 L. Ed. 1161, Marsh v. Alabama, 326 U. S. 501, Valle v. Stengel, 176 F. 2d. 697 (3rd. Cir. 1949), and other citations contained in their brief.

[fol. 75] The State's freedom of action in protecting the peaceful possession of private property outweighs a trespasser's right not to have the state enforce private discriminations. Only when this means of protecting property interests impairs a preferred fundamental right such as freedom of speech, press or religion in a context of great public interest have the courts been inclined to question the constitutionality of a statute. The present state of the law not only recognizes a man's home to be his castle, but allows the state to police his gate and coercively enforce his racial discriminations.

Assuming that arresting the defendants constituted state action (which is denied), the privileges and immunities clause of the 14th. Amendment was not violated because unlike the right to own property (Shelley v. Kraemer)

which is defined by statute, there is no specific right or privilege to enter the premises of another and remain there after being asked to depart. In fact the civil and criminal laws of trespass and real property, put the privilege of peaceful possession in the owner. An extension of the doctrine of Shelley v. Kraemer one step further would mean a holding that the enforcement of a criminal statute, in itself nondiscriminatory, could become discriminatory when the complainant prosecutes for discriminatory reasons and thus finding state action that discriminates because of race, creed or color.

For the reasons assigned in the authorities supporting the constitutionality of statutes similar to L.S.A.-R.S. 14:59(6), the Court holds defendants citations to be inapplicable to the factual and legal situation present in the case at bar.

Defendants' contentions are without merit.

The Court holds L.S.A.-R.S. 14:59(6) constitutional, and the bill of information filed thereunder good and sufficient in law.

The motion to quash is overruled and denied.

New Orleans, Louisiana, 28th day of November, 1960.

J. Bernard Cocke, Judge.

[fol. 76]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

MOTION FOR A NEW TRIAL—Filed January 3, 1961

And Now Come the said Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., through their attorneys John P. Nelson, Jr., Robert F. Collins, Nils R. Douglas and Lolis E. Elie, and move the court that the verdict be set aside and a new trial ordered for the following reasons, to-wit:

I.

The verdict is contrary to law in that:

A. Section 14:59(6) of the Louisiana Revised Statutes of 1960 is unconstitutional in that it violates Article 14 of the United States Constitution and Article IX of the Constitution of the State of Louisiana in that it was enacted to implement and further the State's policy and custom of forced segregation of races in public places and/or places vested with a public interest;

B. Section 14:59(6) of the Louisiana Revised Statutes of 1960 is unconstitutional and violative of Article 14 of the Constitution of the United States and Article IX of the Constitution of the State of Louisiana in that it delegates legislative authority to use discretion without setting limits and standards relevant to a legislative purpose reasonably directed toward the public welfare;

C. Defendants were deprived of equal protection of the law when they were ordered to leave a place of business under the circumstances evidenced by the record, which circumstances were prevailing in the community at the time of their arrest;

D. The information charging defendants with violation of L.S.A.-R.S. 14:59(6), to wit, criminal mischief, is invalid in that the evidence established merely that defendants were peacefully upon the premises of McCrory-McClennan Corp., an establishment performing an economic function invested with the public interest, as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the information other than an effort [fol. 77] to exclude defendants from a portion of the said establishment because of their race or color; defendants at the same time are excluded from equal service at a preponderant number of other similar eating establishments in New Orleans, thereby depriving them of liberty without due process of law and of the equal protection of the laws secured by the 14th. Amendment of the United States Constitution.

E. The evidence offered against defendants in support of the information charging them with violation of L.S.A.-R.S. 14:59(6) establishes that at the time of arrest and at all times covered by the charges, they were in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in McCrory-McClennan Corp., an establishment performing an economic function invested with the public interest; that defendants were peacefully attempting to obtain service in the facilities of McCrory-McLennan Corp., in the manner of white persons similarly situated and at no were defendants defiant or in breach of the peace and were at all times upon an area essentially public, wherefore defendants have been denied rights secured by the due process and equal protection clauses of the 14th. Amendment of the United States Constitution;

F. The evidence establishes that prosecution of defendants was procured for the purpose of preventing them from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protecting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in New Orleans to permit defendants and other members of the Negro race from enjoying the access to facilities and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempting to employ the aid of the court to enforce a racially discriminatory policy contrary to the due process and equal protection clause of the 14th. Amendment to the Constitution of the United States;

G. L.S.A.-R.S. 14:59(6), under which defendants were arrested and charged, is unconstitutional on its face by making it a crime to be on public property after being [fol. 78] asked to leave the premises by an individual at such individual's whim, in that said statute does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendants of the validity of the demand to leave, all of which renders the statute so vague and uncer-

tain as applied to defendants as to violate their rights under the due process clause of the 14th. Amendment to the United States Constitution;

H. L.S.A.-R.S. 14:59(6), under which defendants were arrested and charged with criminal mischief, is on the evidence unconstitutional as applied to defendants in that it makes it a crime to be on property open to the public after being asked to leave because of race or color, in violation of defendant's rights under the due process and equal protection clauses of the 14th. Amendment of the United States Constitution;

I. The evidence offered against the defendants establishes that at the time of arrest and all times covered by the warrant, they were members of the public, attempting to use a facility open to the public, which was denied to them solely because of race or color; that McCrory McClennan Corp. was and is offering, for a price, to serve all members of the public with food; that this public facility, McCrory-McLennan Corp., is, along with others of a similar nature, performing a necessary service for the public which in fact would have to be provided by the state if McCrory-McLennan Corp., and other like facilities were all to withdraw said service; that having determined to offer said valuable service to the public, McCrory-McLennan Corp., is required to provide such service in the manner of state operated facilities of a like nature, to-wit: that McCrory-McLennan Corp., may not segregate or exclude defendants on the ground of race or color, in violation of the due process and equal protection clauses of the 14th. Amendment of the United States Constitution.

II.

The verdict is contrary to the evidence in that:

[fol. 79] The state did not prove beyond a reasonable doubt that the defendants were ordered by the person in charge to leave the premises.

III.

The following errors were committed to the prejudice of the accused:

A. The Court refused to allow evidence showing that employees of McCrory-McLennan Corp., were acting in concert with and/on behalf of the law enforcement agencies and officials of the State of Louisiana.

B. The Court refused to sustain objection to leading questions which were material to the issues;

C. The court refused to allow the introduction of evidence showing the effect that McCrory-McLennan Corp., has on inter-state commerce.

Wherefore, your movers pray that, after due proceedings had, the verdict be set aside and a new trial ordered herein.

S. Langston Goldfinch, Jr., Rudolph Lombard, Cecil W. Carter, Jr., Oretha Castle.

John P. Nelson, Jr., Robert F. Collins, Nils R. Douglas, Lolis E. Elie, By: John P. Nelson.

Duly sworn to by four defendants, jurat omitted in printing.

[fol. 80]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed January 3, 1961

And Now, after verdict against the said Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., through their attorneys John P. Nelson, Jr., Robert F. Collins, Nils R. Douglas, and Lolis E. Elie, and before sentence, move the Court here to arrest judgment herein, and not pronounce the same because of manifest errors in the record appearing, to-wit:

The verdict is contrary to law in that:

A. Section 14:59(6) of the Louisiana Revised Statutes of 1960 is unconstitutional in that it violates Article 14 of the United States Constitution and Article 1 of the Constitution of the State of Louisiana in that it was enacted to implement and further the State's policy and custom of forced segregation of races in public places and/or places vested with a public interest;

B. Section 14:59(6) of the Louisiana Revised Statutes of 1960 is unconstitutional and violative of Article 14 of the Constitution of the United States and Article 1 of the Constitution of the State of Louisiana in that it delegates legislative authority to use discretion without setting limits and standards relevant to a legislative purpose reasonably directed toward the public welfare;

C. Defendants were deprived of equal protection of the law when they were ordered to leave a place of business under the circumstances evidenced by the record, which circumstances were prevailing in the community at the time of their arrest;

D. Louisiana R. S. 14:59(6), under which defendants were arrested and charged, is unconstitutional on its face by making it a crime to be on public property after being asked to leave the premises by an individual at such individual's whim, in that said statute does not require that [fol. 81] the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendants of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to defendants as to violate their rights under the due process clause of the 14th. Amendment of the United States Constitution.

And, because no judgment against them, the said Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., can be lawfully rendered on said record your movers pray that, after due proceedings had, that the judgment herein be arrested.

Rudolph Lombard, S. Langston Goldfinch, Cecil W. Carter, Jr., Oretha Castle.

John P. Nelson, Jr., Robert F. Collins, Nils R. Douglas, Lolis E. Elie, By: John P. Nelson, Jr.

Duly sworn to by four defendants, jurat omitted in printing.

[fol. 82]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

BILL OF EXCEPTION NO. 1 AND PER CURIAM THEREON—
January 10, 1961

Be It Remembered that before entering on the trial of this case, your defendants, having heard the Information read and protesting that they were each not guilty of the offense set out therein, filed the following Motion to Quash the said Information:

Motion to Quash, see Tr. p. 9 et seq.

[fol. 83] That on a subsequent day of Court a hearing was had contradictorily with the State on the said Motion to Quash, (the State having first filed an answer to the Motion to Quash), on which testimony was heard and evidence offered, and that the Court took the matter under advisement.

That on the 28th., day of November, 1960, the Court filed a written ruling overruling and denying the said Motion to Quash to which your defendants then and there objected and reserved a bill of exceptions, making a part of the bill of exception the Information, the Motion to Quash the State's answer to the motion to quash, the evidence offered and testimony heard on the motion to quash, and the court's written ruling overruling and denying the said Motion to Quash, and your defendants now perfect this formal bill of exceptions making a part of the same the said Information, the Motion to Quash, the State's answer to the motion to quash, the evidence offered and testimony heard on the motion to quash, the Court's written ruling overruling and

denying the said Motion to Quash, and the entire record in these proceedings, and first submitting this their formal bill of exceptions to the District Attorney, now tenders the same to the court and prays that the same be signed and sealed by the Judges of this Court, pursuant to the Statute in such case made and provided, which is done accordingly this 10th. day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 84]

Per Curiam to Bill of Exception No. 1

This bill was reserved to the denial of the motion to quash the bill of information.

The motion addresses itself to the constitutionality of L.S.A.-R.S. 14:59(6), the Criminal Mischief statute under which defendants are charged, as well as certain supposed infirmities present in the bill of information.

In passing upon defendants' contentions, the Court filed written reasons upholding the constitutionality of L.S.A.-R.S. 14:59(6), and refusing to quash the bill of information.

The Court makes part of this per curiam the written reasons for judgment.

There is no merit to the bill.

New Orleans, Louisiana, 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 85]

In the Criminal District Court

Parish of Orleans

[Title omitted]

Bill of Exception No. 2 and Per Curiam Thereon—
January 10, 1961

Be It Remembered that on the hearing of the Motion to Quash, during the direct testimony of Mr. Wendell Barrett, a witness for Mover, the following occurred:

"Q. Mr. Barrett have you sir in the last 30 to 60 days entered into any conference with other department store managers here in New Orleans relative to sit-in demonstrations?

A. I don't know what you mean by conferences.

Q. Discussions with them?

A. We have spoken of it, yes.

Mr. Zibilich: Renew my original objection.

The Court: The objection is well taken. I won't permit you to go any further. You can dictate into the record what you want to ask of this witness.

Mr. Nelson: Respectfully object and reserve a bill of exceptions making the question, the objection, and the ruling of the court all part of the bill.

The purpose of this Your Honor is a question of conformity with state policy.

The Court: The man already said that he had the right to determine the policy, based on tradition, custom and the laws of the community. Is that going to affect me in the slightest that he had a meeting with the manager of D. H. Holmes or Godchaux or anybody else, and I don't see the relevancy of it at all. You have established the policy of this store and the policy nationally dictated giving him the discretion. What more do you want?

By Mr. Nelson:

Q. Mr. Barrett, have you ever met with members of the New Orleans Police Department and discussed problems of sit-in demonstrations and how you or how they should be handled if they arise in your store?

Mr. Zibilich: Object.

The Court: Same objection, same ruling.

Mr. Nelson: Respectfully object and reserve a bill of exception, making the question, the objection and the ruling of the court part of the bill.

By Mr. Nelson:

Q. Now Mr. Barrett, would you kindly tell the court the plan or procedure that your store uses here in the city when sit-in demonstrations take place?

[fol. 86] Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: Respectfully object and reserve a bill of exception making the question, objection and the ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Do you have a plan that your employees are aware of which is to go into effect if there is a sit-in demonstration in your store?

Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: Reserve a bill making the question, the objection, and ruling of the court part of the bill."

And Be It Further Remembered, that during the trial of the case on its merits, the State called Captain Lucien Cutrera of the New Orleans Police Department as a witness, that the following testimony was had under cross-examination by Mr. Nelson:

"Q. Did you know officer whether there was any plan approved by the police prior as to what the people should do in the event of a sit-in?

A. I didn't catch the question.

Mr. Zibilich: I object to it.

The Court: Read the question.

The Reporter: "Question: Do you know officer whether there was any plan approved by the police prior, as to what the people should do in the event of a sit-in?"

The Court: The objection is well taken.

Mr. Nelson: I would like to clear up the question. So without re-stating the question I wanted him to tell me whether there was any plan approved by the police as to what store managers of stores such as McCrory's should do in the event of a sit-in. That was my question.

The Court: Same objection and same ruling.

Mr. Nelson: Reserve a bill making the question and the answer and the ruling part of the bill.

Mr. Nelson: We have no further questions."

[fol. 87] As will be seen from the above testimony counsel was attempting to show that McCrory's 5 and 10 Cents Store, 1005 Canal Street, New Orleans, Louisiana, through their Manager, Mr. Wendell Barrett, had met with Managers of other department stores in New Orleans, and had met with members of the New Orleans Police Department, in an effort to formulate a plan or procedure to follow in the event of "sit-in" demonstrations, and that this was done in furtherance of the State's policy of forced segregation.

That the State, through the Assistant District Attorney objected to this character of testimony being offered. That the court overruled the said objections made by counsel for the defendants to which ruling of the court, counsel aforesaid then and there objected and reserved a formal bill of exceptions, making the testimony of Mr. Wendell Barrett and also the testimony of Captain Lucien Cutrera, and the questions and answers asked and objected to by counsel, for the State, and the ruling of the court.

To the action of the Court in not allowing counsel to pursue the above line of questioning, counsel now perfects his said Bill of Exceptions and makes a part of this his formal bill of exceptions the entire testimony of Mr. Wendell Barrett given on the hearing of the motion to quash, and the entire testimony of Captain Lucien Cutrera given on the trial of the case on its merits, and the entire record in these proceedings, including all testimony heard and evidence offered, and first submitting this his Bill of Exceptions to the District Attorney, now tenders the same to the Court and prays that the same be signed and sealed

by the Judge of this Court, pursuant to the Statute in such case made and provided, which is done accordingly this 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 88]

Per Curiam to Bill of Exception No. 2

As will be seen from a reading of the statute under which defendants were prosecuted (L.S.A.-R.S. 14:59(6)), the inquiry sought to be established by defendants was irrelevant and immaterial to any of the issues presented by the bill of information and the charge contained therein.

L.S.A.-R.S. 15:435 provides:

"The evidence must be relevant to the material issues."

L.S.A.-R.S. 15:441 reads in part as follows:

"Relevant evidence is that tending to show the commission of the offense and the intent, or tending to negative the commission of the offense and the intent."

L.S.A.-R.S. 15:442 states, in part:

"The relevancy of evidence must be determined by the purpose for which it is offered."

"A trial judge must be accorded a wide discretion whether particular evidence sought to be introduced in criminal prosecution is relevant to case. L.S.A.-R.S. 15:441."

State v. Murphy, 234 La. 909, 102 So. 2d. 61.

"Exclusion of testimony on grounds of irrelevancy rests largely on discretion of trial judge."

State v. Martinez, 220 La. 899, 57 So. 2d. 388.

"In order to be admissible, evidence must be both (1) relevant or material, and (2) competent.

Evidence is competent when it comes from such a source and in such form that it is held proper to admit it.

Evidence is relevant when it is persuasive or indicative that a fact in controversy did or did not exist [fol. 89] because the conclusion in question may be logically inferred from the evidence. The criterion of relevancy is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry." etc.

Wharton's Crim. Ev. (12th Ed.) Vol. 1, p. 283, Sec. 148.

The bill is without merit.

New Orleans, Louisiana, 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 90]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

BILL OF EXCEPTION NO. 3 AND PER CURIAM THEREON—
January 10, 1961

Be It Remembered that at the conclusion of the trial of this case the Judge found each defendant guilty of the offense set out in the Information on which each defendant was being tried.

That on a subsequent day of the term of this Court, before any judgment was entered on the said verdict rendered by the trial judge finding each defendant guilty, and before any sentencing had been imposed defendants, through counsel, filed a Motion for a New Trial, the said Motion for a New Trial reading as follows:

Motion for New Trial, See Tr. 76, et seq.

[fol. 91] The Court, after hearing the said Motion of the defendants for a New Trial, denied and overruled the same, and to such action of the court, counsel for the defendants then and there objected and reserved a formal Bill of Exception and counsel now perfects this his formal

bill of exceptions to the overruling of the Motion for a New Trial and makes a part hereof the bill of information, the motion to quash, the State's answer to the Motion to Quash, all testimony and evidence offered on the hearing on the motion to quash, the court's written ruling overruling and denying the motion to quash, all evidence offered and testimony heard on the trial of the case on its merits, the motion for new trial, the court's ruling on the motion for a new trial, and the entire record in these proceedings, and first submitting this his Bill of Exceptions to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court, pursuant to the Statute in such case made and provided, which is done accordingly this 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 92]

Per Curiam to Bill of Exception No. 3

The bill was reserved to the denial of defendants' motion to a new trial.

Insofar as the written reasons for denying the motion to quash are applicable to defendants' motion for a new trial the Court submits same as its reasons for denying the said motion.

A reading of the statute under which defendants were prosecuted (L.S.A.-R.S. 14:59(6)), is sufficient refutation to the other allegations of the motion for a new trial, as the matters contended for were irrelevant and immaterial to any of the issues present in the proceedings.

As no request was made of the Court to charge itself on the legal questions raised by defendants in the motion for a new trial, defendants cannot be heard to complain.

The Court was convinced beyond all reasonable doubt, that each and every element necessary for conviction was abundantly proved.

The appellate court is without jurisdiction to pass upon the sufficiency of proof.

New Orleans, Louisiana, 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 93]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

BILL OF EXCEPTION NO. 4 AND PER CURIAM THEREON—January 10, 1961

Be It Remembered that the conclusion of the trial of this case the Judge found each defendant guilty of the offense set out in the information on which each defendant was being tried.

That on a subsequent day of the term of this court, before any judgment was entered on the said verdict rendered by the trial judge finding each defendant guilty, and before any sentence had been imposed defendants, through counsel, filed a Motion in Arrest of Judgment, the said Motion in Arrest of Judgment reading as follows:

Motion in Arrest of Judgment, See Tr. p. 80 et seq.

[fol. 94] The Court, after hearing the said Motion in Arrest of Judgment of the defendants, denied and overruled the same, and to such action of the court, counsel for the defendants then and there objected and reserved a formal Bill of Exception and counsel now perfects this his formal bill of exceptions to the overruling and denying of the said Motion in Arrest of Judgment, and makes a part hereof, the bill of Information, the motion to quash, the State's answer to the Motion to Quash, all the testimony heard and evidence offered on the hearing of the Motion to Quash, the Court's written ruling overruling and denying the motion to quash, all evidence offered and testimony heard on the trial of the case on its merits, the Motion in Arrest of Judgment, the Court's ruling on the motion in arrest of judgment, the motion for a new trial, the court's ruling on the motion for a new trial, and the entire record in these proceedings, and first submitting this his Bill of Exceptions to the District Attorney, now tenders the same to the court and prays that the same be signed and sealed by the Judge of this Court, pursuant to the Statute in such

case made and provided, which is done accordingly this 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 95]

Per Curiam to Bill of Exception No. 4

This bill was reserved to the denial of defendants' motion in arrest of judgment.

Insofar as the written reasons for denying the motion to quash an applicable to defendants' motion in arrest, the court submits same as its reasons for denying the motion in arrest of judgment.

The remaining contentions of defendants have no place in a motion in arrest of judgment, and were matters of defense.

There is no merit to defendants' bill.

New Orleans, Louisiana, 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 96]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

MOTION FOR APPEAL AND ORDER THEREON—January 10, 1961

And Now Into Open Court come the defendants, Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., through undersigned counsel, and on suggesting to the Court that the record herein shows error to their prejudice, a miscarriage of justice and same constitutes a violation of their constitutional rights, and that they are desirous to appeal to the Honorable The Supreme Court of the State of Louisiana; and on further suggesting to the Court that each defendant be admitted to bail pending said appeal on each furnishing bond in an amount fixed by this Honorable Court, conditioned as the law directs;

Wherefore, they pray that they be granted a suspensive appeal to the Honorable the Supreme Court of the State of Louisiana, returnable in accordance with law, and further that they each be admitted to bail pending said appeal on each furnishing bond in an amount to be fixed by this Honorable Court as the law directs.

Rudolph Lombard, Oretha Castle, S. Langston Goldfinch, Cecil W. Carter, Jr.

John P. Nelson, Jr., Robert F. Collins, Nils R. Douglas, Lolis E. Elie, By: John P. Nelson, Jr.

Order

Let a suspensive appeal be granted in this case on behalf of the defendants, Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., to the Supreme Court of the State of Louisiana, and let the return date be the 1st., day of February, 1961; and further that they each be admitted to bail in the sum of Seven Hundred and Fifty Dollars with good and solvent security condition as the law directs; the bond be taken and sureties approved by the Criminal Sheriff for the Parish of Orleans, or by one of his lawful deputies.

New Orleans, La. Jan. 10, 1961

J. Bernard Cocke, Judge.

[fol. 97]

In the Criminal District Court

Parish of Orleans

[Title omitted]

Transcript of Testimony

Testimony and notes of evidence taken on the trial of the above entitled and numbered cause on the 7th., day of December, 1960, before the Honorable J. Bernard Cocke, Judge Presiding.

APPEARANCES:

Robert J. Zibilich, Esq., Assistant District Attorney, For the State.

John P. Nelson, Jr., Esq., Lolis E. Elie, Esq., Nils Douglas, Esq., Attorneys for defendants Sydney Langston Goldfinch, Jr., Oretha Castle, Joseph Lombard, Cecil W. Carter, Jr.

Reported by:

Charles A. Neyrey, Official Court Reporter, Section "E".

[fol. 98] The Court: Is the State ready?
Mr. Zibilich: Yes sir.
The Court: Is the Defense ready?
Mr. Nelson: Yes sir, we are ready.

ROBERT GLENN GRAVES, a witness for the State, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Zibilich:

Q. State your name please?
A. Robert Glenn Graves.
Q. Where do you live?
A. 6221 Wainwright Drive.
Q. By whom are you employed?
A. McCrory-McClennan Corporation.
Q. Where are you employed?
A. McCrory's 5 and 10 Cents Store, 1005 Canal Street.
Q. In what capacity?
A. Restaurant Manager.
Q. On the day in question, the 17th., of September, 1960, were you on duty on that day in McCrory's Restaurant?
A. Yes sir, I was.
Q. What time did you come on duty?
A. Seven A. M.

Q. Were you there throughout the day until about 10:30 or 11:00 in the morning?

A. Yes sir.

[fol. 99] Q. Did anything of an unusual nature occur between the hours of 10:00 and 11:00 in the morning?

A. Around about that time, I was in the main restaurant facing towards Burgundy by the cash register, by the main restaurant, and a man came from the side refreshment counter, I have charge of all the counters there, and he motioned to me and I went towards him and as I approached he said—

Mr. Nelson: I object.

Examination (resumed).

By Mr. Zibilich:

Q. Don't say what he said. What did you do?

A. I went to the side counter.

Q. What did you observe, if anything?

A. At the side counter there was seated two colored males and a colored woman and a white man.

Q. Do you see those people in the courtroom today?

A. Yes, they are seated over here.

Q. Were they the ones seated at that bench before the bar?

A. That is right.

Q. You are speaking of a counter and a main restaurant, are there more than one counter in that establishment?

A. Yes sir. They have a main restaurant that seats 210 and we have a counter for colored that seats 53 and then we have a white refreshment bar that seats 24 and then we have two stand-up counters.

Q. The particular counter at which was seated the individuals you described, was that reserved for any particular people?

A. I don't know what you mean.

By the Court:

Q. By color?

A. Yes.

Examination (resumed).

By Mr. Zibilich:

[fol. 100] Q. For what?

A. For white patrons.

Q. Upon seeing these people, what did you do?

A. I went behind the counter and faced them and said to them, I am not allowed to serve you here. We don't serve you here. We have to sell to you at the rear of the store where we have a colored counter. And then I waited for a reply.

Q. Did you get any?

A. No reply.

Q. What then did you do?

A. I closed the counter.

Q. How? Actually how?

A. Well, I considered it an emergency, unusual circumstances, and we have a sign for that purpose, and then I told the girl on the counter to close down.

By the Court:

Q. What does the sign say?

A. This counter is closed.

We displayed the sign to each one and said this counter is closed, and then we cut off the lights and told the girl, I told the girl to lock-up the money and that the counter was closed for business.

Examination (resumed).

By Mr. Zibilich:

Q. Did they actually lock-up the counter?

A. Yes sir.

Q. What did the four defendants do?

A. They sat there.

Q. Did you inform anyone about this?

A. I started back to the main restaurant and motioned to one of the girls that approached me, and told her to contact the store manager Mr. Barrett and then I went back to the main restaurant and stood by there.

[fol. 101] Q. Did you do any thing further about calling the police?

A. As a matter of routine procedure I called the police, I think it is Emile Poissnot. That was the usual routine.

Q. This McCrory is located at 1005 Canal Street?

A. Yes sir.

Q. Is that in the city of New Orleans?

A. Yes sir.

Q. I tender the witness. Answer Mr. Nelson and Mr. Elie.

Cross examination.

By Mr. Nelson:

Q. Mr. Graves, as a matter of routine procedure you called the police, Mr. Emile Poissnot?

A. Yes sir.

Q. Who is he?

A. A detective.

Q. Did you know his name before you called him?

A. Yes sir, for some time.

Q. Do you call him because he is a friend of yours?

A. I called him because I knew him, and it was customary in any kind of emergency to call the police.

Q. When you were confronted with this situation you considered this an emergency sir?

A. Yes.

Q. Had you planned what you all were going to do to take care of this particular emergency?

A. Any emergency, fire or drunk or any possibility.

Q. I am talking about when Negroes sit at a white counter, did you plan what you were going to do?

A. No particular plan. They had a sit-in a week and a half before that.

[fol. 102] Q. It had been discussed?

A. We—everybody knew about it.

Q. Did you not plan, or make plans as to what was going to be done?

A. Not any particular plan.

Q. Did you make any particular plans?

A. It came under the same procedure in case of any emergency.

Q. Did you have a consultation with Mr. Barrett before you called the police?

A. That particular day?

Mr. Nelson: At this time I would like to move for a sequestration of all witnesses.

The Court: All witnesses in this case on trial both for the state and the defense step outside in the corridor to await your being called.

Examination (resumed).

By Mr. Nelson:

Q. Did you talk to Mr. Barrett before the police were contacted?

A. That particular day?

Q. Yes sir.

A. I had spoken to him.

Q. Did you speak to him after the defendants were seated at the counter or before they were seated there?

A. About what?

Q. About calling the police?

A. I contacted my clerk and let her call the officers.

Q. Did you call before—did you call the police before or after you called Mr. Barrett?

A. I called the police after I notified Mr. Barrett.

Q. Did you do that on your own initiative?

[fol. 103] The Court: I won't permit you to go into that. It is not relevant.

Whether these people had a right to be there or didn't have a right to be there, or whether they were there by accident or lack of intention contrary to the rules of the establishment—what happened between this man there as a matter of policy is of no consequence, it is irrelevant and immaterial. Let's go on to something else.

Mr. Nelson: That includes any plan he may have had with the police?

The Court: Let me point this out. I speak of knowledge. In the neighborhood where I live, Canal Boulevard and Mouton Street there are prowlers each night. My neighbors and myself get together and propose to meet in the front

living room of my home, we meet and agree to patrol the neighborhood. Consequently we accost the prowler and we have to shoot him because he comes in my premises. By analogy that is the same idea.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Graves, these defendants were not creating any disturbance by loud talking while they were seated at the counter?

A. Not while I was there. They didn't say anything.

Q. Insofar as you observed they were being quiet?

A. They had nothing to say.

Q. Were they well dressed?

A. I didn't observe that particularly, all this happened in about a period of five minutes and I didn't particularly notice how they were dressed.

Q. Mr. Graves, the only reason why you closed the counter was that these defendants were Negroes and they were sitting there?

A. I considered it an unusual circumstance and I closed it, I considered it a reason for closing the counter. I took [fol. 104] it on myself because I was in charge and I closed the counter.

The Court: You got your answer now go on to something else.

Mr. Nelson: Your Honor before I ask this man some questions I would like to acquaint the court the nature of the questions so the court can rule. I would like to ask this man concerning the effect of McCrory's on interstate commerce.

The Court: He is going to ask you certain questions and you are not to answer until I tell you to do so.

Examination (resumed).

By Mr. Nelson:

Q. How long have you been employed by McCrory's, Mr. Graves?

The Court: I don't see the relevancy of that.

Mr. Nelson: Did the state object?

The Court: The State doesn't have to object.

Mr. Nelson: Then the court— Your Honor I don't—

The Court: I interject an objection. I don't want to sit here and hear a lot of testimony—

Mr. Nelson: That is why I wanted to tell the court what I intended to ask or get from Mr. Graves.

The Court: He is not going to answer the questions.

By Mr. Nelson:

Q. Do you have any idea of what percentage of goods that is purchased by McCrory's and used in your depart-[fol.105] ment comes from outside the State of Louisiana?

The Court: Don't answer the question.

Mr. Nelson: And for the purpose of the record this is to establish the interstate commerce evidence.

The Court: The Supreme Court of the United States didn't go that far.

Mr. Nelson: I beg your pardon.

The Court: I said that in their decision of the other day the Supreme Court of the United States didn't go that far.

Mr. Nelson: In connection with the ruling of the court like to reserve a bill of exception and making part of the bill my question and the Court's ruling.

Cross examination.

By Mr. Elie:

Q. Mr. Graves in answer to one of Mr. Zibilich's questions, you say that when the defendants sat at the counter you told them that you were not allowed to serve them. Is that correct sir?

A. Can I answer that?

The Court: Yes.

A. Yes.

Q. Will you tell the court why you were not allowed to serve them?

Mr. Zibilich: I don't know whether that is relevant?

[fol.106] The Court: It is not material.

Mr. Elie: Your Honor please—

The Court: The objection is sustained.

Mr. Elie: I think it is material, because if Mr. Graves felt there was some State policy that prevented him from serving these defendants this is a clear state action. I think the question is relevant.

Mr. Zibilich: I think that was covered by the motion to quash and the court has ruled on that.

The Court: The objection is sustained.

Mr. Nelson: Reserve a bill of exception Your Honor and make a part of it the question, the court's ruling and the sustaining the objection, and further make that on the part of all defendants.

By the Court:

Q. Let me ask you a few questions. You refer to the fact that these defendants took seats at the main restaurant or dining room or in the lunch room?

A. No sir, this was at a side counter.

Q. What does that consist of that side counter towards Burgundy?

A. It is on the opposite side of the store. There are 24 stools and it is a straight counter and we serve a variety of foods.

Q. Are there any signs of any kind to indicate what the circumstances are under which you would serve, whether you serve white or colored or both?

[fol. 107] A. No sir.

Q. Now how long has that counter been a white counter?

A. Approximately since 1938.

Q. Since '38. And you say that in another part of the store you have a counter to serve colored folks?

A. Yes sir that is right.

Mr. Nelson: I am going to interpose an objection. This man, I can't quite figure out his direct examination, and therefore I am going to object to the leading type of questions being asked by the Court.

The Court: Your objection is overruled. I know what I am doing.

Mr. Nelson: To which we reserve a bill of exceptions making the objection and the question and the ruling of the court all part of the bill.

The Court: Reread the question and the answer.

The Reporter: "Question: Since '38. And you say that in another part of the store you have a counter to serve colored folks? Answer: Yes sir that is right."

Examination (resumed).

By the Court:

Q. And you informed these defendants there was a counter for colored folks somewhere else in the store?

A. Yes sir.

Q. And they made no reply?

A. No reply.

Mr. Nelson: Same objection for the same reason.

[fol. 108] Mr. Nelson: I objected your Honor.

The Court: Same ruling by the court.

Mr. Nelson: Same objection and reserve a bill of exception making the objection and the ruling of the court as well as the question and answer part of the bill.

Mr. Wendell Barrett, a witness for the State, after being first duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Zibilich:

Q. State your name please?

A. Wendell Barrett.

Q. Where do you live Mr. Barrett?

A. 4934 Reed Boulevard.

Q. By whom are you employed?

A. McCrory-McClellan Corporation.

Q. Were you employed by the same corporation on the 17th., of September, 1960?

A. I was.

Q. In what capacity were you employed there on the 17th., of September of this year?

A. Store manager.

Q. Where is that store?

A. 1005 Canal Street.

Q. Is that in the city of New Orleans?

A. New Orleans.

Q. What kind of store is that?

[fol. 109] A. A variety of merchandise.

Q. Do you have any restaurants or counters there?

A. Yes sir.

Q. How many restaurants or counters for serving food does it have?

A. Let me see. There are four.

Q. On this particular day, the 17th., of September, 1960, were you on duty as the manager of that particular store on that particular day?

A. I was.

Q. Were you there between the hours of 10 and 11 A. M.?

A. I was.

Q. Now I want to ask you to look at these defendants seated on the bench before the bar and I ask you whether or not you saw them on that day in that store?

A. I did.

Q. About what time and where?

A. About 10:30 at the side refreshment counter.

Q. What counter?

A. On the Burgundy Street side of the building.

Q. What if anything was anybody doing when you saw these four defendants at that counter, in that vicinity?

A. When I saw the four defendants they were sitting at the counter by themselves and the counter was closed up and there were no other people there.

Q. Were there any police officers present in the vicinity of these defendants?

A. No.

Q. Did any come on the scene?

A. A number came on the scene shortly afterwards.

Q. Do you know the names of any of them?

[fol. 110] A. Major Reuther and Emile Poissnot.

Q. Was there a Cutrera?

A. Yes.

Q. What if anything did you do or say to the defendants?

A. In view of the fact the department was closed I went behind the counter and stood in front of the defendants and showed them the sign reading this department is closed and I asked them if they could read the sign and then I informed them that what the sign said was correct, the department was closed and requested that they leave the department.

Q. What if anything did the defendants say?

A. Didn't say anything, they just sat there.

Q. Did they do anything?

A. Didn't do anything.

Q. Did you say that in a loud voice?

A. I said it in a loud voice so that it could be heard by anyone in the immediate vicinity.

Q. How far were you from the defendants?

A. Standing right in front of them about three feet.

Q. Was anyone else present that you knew, any police officers?

A. Major Reuther, Emile and some of the other officers but I don't recall all their names.

Q. Then what if anything happened with respect to these defendants?

A. Major Reuther asked the defendants if they heard what I said and they didn't make any reply, that I could hear, and he reemphasized the fact the department was closed. He also pointed to the sign as I recall. He asked one of the defendants on the end who was the leader—

Mr. Nelson: I object.

[fol. 111] The Court: What is your objection?

Mr. Nelson: This is hearsay.

The Court: What is hearsay—what the defendants replied?

Mr. Nelson: What the police officer said.

By the Court:

Q. I understood the police officer spoke to one of the defendants or to all of these defendants.

A. That is what I said.

Q. Any replies given by either one of the defendants to the statement in question is not hearsay.

A. He asked the defendant on the end.

Q. Suppose you answer my question. Was there any reply to the question propounded by the officer?

Mr. Nelson: I object to the leading question.

The Court: Objection overruled.

Mr. Nelson: Reserve a bill of exception making the question, the objection and the ruling of the court part of the bill.

By the Court:

Q. You understood my inquiry. You started to say one of the police officers addressed a question to one or several of the defendants?

A. That is correct.

Q. Did either one of the defendants reply to questions asked of them?

A. Yes sir.

Q. Proceed.

[fol. 112] Mr. Nelson: I am going to object to the question.

The Court: The objection is overruled.

Examination (resumed).

By Mr. Zibilich:

Q. Relate what was said and who answered and what was said?

A. Major Reuther asked the defendant on the end there who was the leader of the group—

Q. Who was the defendant?

A. The two colored men on the end and they pointed to the white man.

Mr. Nelson: I object Your Honor, that is all immaterial.

The Court: You may object to all of this testimony. The state has to prove under the very statute here, under the

very wording of the statute the intentionally taking of possession, therefore anything is relevant to show that it was no accident, or the fact that they didn't intend to remain, or that they were just passing through and their feet hurt and they wanted to rest. The state has to prove and they have a right to show it was an intentional taking.

Mr. Nelson: Your Honor, once the counter was closed it was intentional to stay there. The sign was already up.

Respectfully object and reserve a bill of exception making the objection and the ruling and the question part of the bill.

By the Court:

Q. Mr. Barrett, you said something about the two defendants on the end?

A. The two colored men on the end.

[fol. 113] Q. What is your name on the end?

Mr. Nelson: Object Your Honor. Are you addressing the defendants and asking them questions?

The Court: I am asking him his name, so the record can show who he is.

Mr. Nelson: Respectfully reserve a bill of exception to the court's asking the defendants their names.

The Court: All right. I will ask you his name. Will you give me his name?

Mr. Nelson: Yes sir.

The Court: Well what is his name?

Mr. Nelson: Lombard.

The Court: The one on the end?

Mr. Nelson: Yes sir.

The Court: What is the second man's name?

Mr. Nelson: Cecil Carter is the second one.

The Court: Let the record show that the defendants identified by the witness were later identified by name.

[fol. 114] Examination (resumed).

By Mr. Zibilich:

Q. What did they reply?

A. They said the white man on the end was the leader of the group. Major Reuther asked the white man if what they said was correct and I heard the white man say he was the leader.

Mr. Nelson: Object as being leading?

The Court: The objection is overruled.

Mr. Nelson: Reserve a bill and make a part of the bill the necessary ingredients.

The Court: Mr. Barrett you listen to my ruling. Don't listen to either one of the other gentlemen, you listen to me.

Examination (resumed).

By Mr. Zibilich:

Q. What did Major Reuther say to the white man?

A. He asked the white man if he was the leader and he said he was the leader. He asked him what was the purpose, why they were sitting there and the white man said they were going to sit there until they were going to be served.

The Court: Mr. Nelson, the white man what is his name?

Mr. Nelson: You know his name.

The Court: I know his name, but what is his name for the record Mr. Nelson?

Mr. Nelson: Goldfinch.

The Court: The witness identified Goldfinch.

[fol. 115] By Mr. Zibilich:

Q. Was there any more conversation between the officers or you and any of the defendants after that?

A. Major Reuther told the white man, or spoke to the group that he would give them two minutes to leave.

Mr. Nelson: I didn't want to interrupt the witness, but I want to object.

The Court: I wish you would stand on that statement.

Mr. Nelson: I just want the record to show the bill reservation.

The Court: Unless the stenographer is somewhere out of town he heard it.

Mr. Nelson: May I make a statement about the police officers. I object to this type of questions. It may be admissible, this type of questioning under some circumstances—

The Court: You made a lot of objections. You have been giving us a lot of objections. The objection is either good or not good all along the same line. Let's consider your objection to all this character of testimony. The same ruling and the same bill applies.

Examination (resumed).

By Mr. Zibilich:

Q. After Reuther gave them this period of time, did they leave?

A. They didn't. They sat there.

Q. Then what took place in your presence?

A. The time ran out and the police officers led them out the door.

Q. I tender the witness.

[fol. 116] Cross examination.

By Mr. Nelson:

Q. What time of the day was your counter closed at McCrory's?

A. About 10:30.

Mr. Zibilich: Object. Immaterial.

The Court: Your objection is overruled.

Examination (resumed).

By Mr. Nelson:

Q. Have you ever closed that counter at 10:30?

A. I may have closed it at 10:30. It is closed under any sort of disturbance.

Q. In other words if three negroes came up to that counter at 10:30 you would close it?

A. If three negroes walked up there I would tell them

we had a colored counter in the back, because they might be passing through from the North and not understand Southern customs.

Q. Is that a usual—

A. I might mention that is a common procedure—

Q. I will ask the questions. Express your social principles at another place.

The Court: Complete your answer whether he objects to it or not.

A. We have colored people come in sometimes and they don't understand. It is a relatively common thing.

Examination (resumed).

By Mr. Nelson:

Q. Do you have any signs up?

A. No signs sir.

Q. Now it is a fact Mr. Barrett these defendants were [fol. 117] asked to leave only because of the fact they were negroes?

Mr. Zibilich: Object to that.

A. One of them is not a negro.

The Court: I think that question is legitimate.

Examination (resumed).

By Mr. Nelson:

Q. They were asked to leave because of the fact and only because of the fact they were negroes?

A. They weren't all negroes. One was a white man. We asked him to leave too.

Q. The three negroes, you asked them to leave only because of the fact they were negroes?

A. The department was closed and they were asked to leave. They were asked to leave because the department was closed.

Q. But because they were negroes?

A. They were negroes.
Q. They weren't being loud or boisterous?

Mr. Zibilich: I object to that. They aren't charged with disturbing the peace.

The Court: Under the circumstances if he wants to put it in evidence I see no objection.

Mr. Nelson: What is the ruling of the court?

The Court: I see no objection.

Examination (resumed).

By Mr. Nelson:

Q. You may answer that question.
A. No.
Q. They were sitting there quietly?
[fol. 118] A. Yes.
Q. Do you know Emile Possinot?
A. Yes sir.
Q. How often does he go to McCrory's on official duty?
A. Often we call him and I might say we call him quite often for shop lifters, pick pockets, somebody may lose their wallet, he is our contact with the police department.

Mr. Nelson: I would like to ask Mr. Barrett some questions dealing with whether this business is engaged in interstate commerce.

The Court: Don't answer until I rule.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett you are the manager of McCrory's store in New Orleans?
A. Yes sir.
Q. And that is one of a chain of stores throughout the United States?
A. Yes sir.
Q. Do you have any idea of what percentage of the business, the purchases of McCrory's comes from outside the state of Louisiana?

Mr. Zibilich: Object to that question. It is immaterial.
The Court: The objection is sustained.
Mr. Nelson: Reserve a bill of exception making a part of the bill the question, the objection, and the ruling of the court.

Examination (resumed).

By Mr. Nelson:

Q. Do you have any opinion as to the percentage of purchases that go to the lunch counters that come from [fol. 119] outside the State of Louisiana?

Mr. Zibilich: Same objection.
The Court: Same ruling.
Mr. Nelson: And reserve a bill of exception making the question, the answer and the ruling of the court part of the bill.
I have no further questions.

By the Court:

Q. Am I correct in my recollection that Mr. Goldfinch stated that they were going to remain until they were going to be served, is that correct?
A. Yes sir.
Q. Is that what he stated to you and the police officers?
A. Yes sir.

Examination (resumed).

By Mr. Nelson:

Q. How many departments do you have in McCrory's, approximately?
A. Must be about 20, 15 or 20 I would say.

CAPTAIN LUCIEN CUTRERA, a witness for the State, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Zibilich:

Q. State your full name.
A. Captain Lucien Cutrera.
Q. By whom are you employed?
A. The New Orleans Police Department.
Q. In what capacity?
A. Commanding Officer of the First District Station.
Q. Were you so employed and in the same capacity on [fol. 120] the 17th, of September, 1960?
A. Yes I was.
Q. In connection with your duties as a police officer did you have occasion on that day to investigate any occurrence or alleged sit in demonstration that would have occurred on Canal Street?
A. Yes sir I did, at McCrory's.
Q. Did you go to that store as a result of this investigation?
A. I did.
Q. Did you go alone or were you accompanied by someone?
A. Desk Sergeant Mickey Rizzutto and followed by Technician Bernard Fruchtzweig.
Q. At what time of the day or night did you arrive?
A. Approximately 10:35 A. M.
Q. Where is McCrory's located?
A. Iberville and Burgundy.
Q. Is that in the city of New Orleans?
A. In runs through the block. 1005 Canal Street is the address.
Q. I ask you to look at the four defendants sitting on the bench and tell me whether or not you saw those defendants in McCrory's at that time and date?
A. Yes sir, I did.
Q. You saw all the defendants there?

A. Yes sir.
Q. Where were they the first time you came in the store?
A. Seated at the side lunch counter.
Q. Where is that lunch counter located?
A. In McCrory's store.
Q. Any particular street side of the store, if you recall?
A. Can't recall exactly.
Q. Is it in the back?
A. Towards the back of the store about the middle.
Q. Anyone else around the lunch counter any civilians or police officers?
[fol. 121] A. Yes detective Poissinot, Patrolman Raymond Gonzales, saw the Manager of the store—
Q. Did you meet a man called Barrett?
A. Yes sir, I did.
Q. Would you recognize Barrett if you saw him again?
A. Yes sir.
Q. Was he the man that just left the witness stand?
A. I didn't see who left.

(Mr. Barrett was called into the courtroom for the purpose of identification and then left the courtroom.)

Q. Did you see Mr. Barrett today?
A. Yes sir.
Q. Did you see him in the courtroom?
A. He is the gentleman you just called in.
Q. Did you see that same gentleman, Mr. Barrett, at the store that time and day?
A. Yes sir, I did.
Q. Where was Mr. Barrett when you saw him?
A. Mr. Barrett was standing near the counter and I was introduced to him by Detective Poissinot.
Q. Did either you or Barrett say anything to the defendants?
A. Mr. Barrett went behind the counter and told them the counter was closed and that he didn't wish to serve them and he asked them to leave the store.
Q. Did they leave?
A. No, they said—

Mr. Nelson: I object your Honor.
The Court: Objection is overruled.

[fol. 122] Mr. Nelson: Reserve a bill of exception.

Examination (resumed).

By Mr. Zibilich:

Q. Were you at the lunch counter at all times?
A. Yes sir, I was.
Q. At any time when you were there did the defendants get up and leave?
A. Not until we took them out.
Q. What lead up to your taking them out?
A. After Mr. Barrett asked them to leave the store—

Mr. Nelson: Object to what Mr. Barrett said.
The Court: The objection is overruled.
Mr. Nelson: Reserve a bill of exception.

Examination (resumed).

By Mr. Zibilich:

Q. Proceed.
A. Major Reuther and I were standing immediately to the rear of the four defendants. I was with Major Reuther and he asked if they all understood Mr. Barrett's statement. He asked each one individually and he then told them they had one minute to leave the store.
Q. Did they leave?
A. They did not leave the store, and actually they were not taken out until about 6 minutes passed.
Q. They were placed under arrest?
A. Yes sir.
Q. Who placed them under arrest?
A. Major Reuther and I.

Cross examination.

By Mr. Nelson:

Q. Captain did you take part in any conference with the [fol. 123] District Attorney and tell the District Attorney the story you are telling today?

A. No.

The Court: I didn't understand the question.

Examination (resumed).

By Mr. Nelson:

Q. I asked did he take part in any conference concerning his testimony that he was going to give, with the district attorney?

A. I spoke with Mr. Zibilich outside just before we came in.

Q. Was Mr. Barrett present?

A. No.

Q. Have you talked with Mr. Barrett since this incident happened?

A. No, I haven't.

Q. Have you talked with Mr. Barrett concerning the statements made by Mr. Barrett since the incident happened?

A. Since the arrest?

Q. Yes.

A. No.

Q. Captain, prior to any instructions being given to anyone, did you and Mr. Barrett and Mr. Graves have a conference outside the presence of the defendants?

A. I spoke with Mr. Barrett. I don't know Mr. Graves at all before the arrest or before we spoke to the defendants.

Q. This was outside the presence of the defendants?

A. It was right by the lunch counter.

Q. Who else was present?

A. Detective Poissinot and Patrolman Gonzales as I remember.

Q. Now, who had a law book during that particular conference?

The Court: Ask him first if there was a law book.

Examination (resumed).

By Mr. Nelson:

[fol. 124] Q. Was there a law book present?

A. Not that I know of.

Q. Who decided what law to charge these people under?

Mr. Zibilich: I object to that.

The Court: The objection is well taken.

Examination (resumed).

By Mr. Nelson:

Q. Who decided what statement—

The Court: Ask him first whether it was decided to make any statement. That is improper cross-examination.

Examination (resumed).

By Mr. Nelson:

Q. Statements were made by Mr. Barrett to these defendants?

A. Yes sir.

Q. You testified to what you heard Mr. Barrett say. Did you tell Mr. Barrett what to tell these defendants?

A. I didn't tell him the exact words to say. He asked me what to do.

Q. Now, did you tell Mr. Barrett—

The Court: You asked the question and you got your answer.

Mr. Nelson: Yes, I am asking him the question.

The Court: I am running this show. You cut the witness off. You ask a question and then you cut the witness off.

Mr. Nelson: I am asking the question so as not to get any hearsay in the record and I certainly have a right to that.

I asked him what he said, that is all Judge.

The Court: He is trying to answer you but you all want [fol. 125] to cut him off.

Mr. Nelson: Because he is giving hearsay evidence.

The Court: You take any bills of exception you want but I am still going to let this witness testify. Read the question and you answer the question.

The Reporter: "Question: You testified to what you heard Mr. Barrett say. Did you tell Mr. Barrett what to tell these defendants?" "Answer: I didn't tell him the exact words to say. He asked me what to do."

By the Court:

Q. Now complete your answer.

A. Mr. Barrett had told me he wanted these people out the place.

Mr. Zibilich: I didn't hear that part of the answer.

A. Mr. Barrett had said he wanted the people out of the place, that he wanted them away from the lunch counter. I asked him if he had ordered them away and would he do so in our presence. That we must witness his statement to them that he didn't want them in the place. Mr. Barrett said he was going to order them out the place and he went behind the counter and made the statement to them and while he was talking to them he showed them the sign that said that this counter was closed.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett said he wanted them out too?

A. Away from the counter and out the store.

Q. That is what he told them. Is that your testimony?

A. Yes.

[fol. 126] Q. That is what he told them?

A. As far as I recall it.

Q. Could there be any doubt in your mind?

A. There is no doubt in my mind that he wanted them away from there.

Q. That he wanted them away from the counter?

A. And the store.

The Court: You got your answer Mr. Nelson.

Examination (resumed).

By Mr. Nelson:

Q. And Mr. Emile Poisinot, this detective, isn't it unusual for a place to call for a policeman by name?

A. I don't know how Detective Poissinot received the complaint.

Q. Do you know why he was there?

A. I don't know why or how he was called there.

Q. Was he the first policeman on the scene?

By the Court:

Q. Do you know whether he was or wasn't?

A. I don't know whether he was the first one.

Examination (resumed).

By Mr. Nelson:

Q. Do you know officer whether there was any plan approved by the police prior, as to what the people should do in the event of a sit-in?

A. I didn't catch the question.

Mr. Zibilich: I object to it.

The Court: Read the question.

The Reporter: "Question: Do you know officer whether there was any plan approved by the police prior, as to what the people should do in the event of a sit-in?"

[fol. 127] The Court: The objection is well taken.

Mr. Nelson: I would like to clear up the question. So without restating the question I wanted him to tell me whether there was any plan approved by the police as to what store managers of stores such as McCrory should do in the event of a sit-in. That was my question.

The Court: Same objection and the same ruling.

Mr. Nelson: Reserve a bill making the question and the answer and the ruling part of the bill.

Mr. Nelson: We have no further questions.

Major Edward Reuther, a witness for the state, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Zibilich:

Q. State your full name?
A. Edward M. Reuther.
Q. By whom are you employed?
A. The New Orleans Police Department.
Q. In what capacity?
A. As Supervisor of Districts.
Q. What is your rank?
A. Major.
Q. And Major were you so employed and in the same capacity on the 17th, of September, 1960?
A. I was.
Q. Were you on duty that day?
A. I was.

[fol. 128] Q. Did you have occasion to investigate an occurrence or alleged occurrence at McCrory's that morning?
A. I did.
Q. Did you go to investigate?
A. I did.
Q. Did you go alone?
A. I went alone.
Q. Where is McCrory's located?
A. 1005 Canal Street.
Q. Is that in the City of New Orleans?
A. Yes sir.
Q. I want you to look at the four defendants seated on the bench before the bar and tell me whether or not you

saw them in McCrory's that morning of September 17th, 1960?

A. Yes, I saw them.

Q. About what time did you arrive at McCrory's?

A. About 10:35.

Q. What was the first thing you did on arriving?

A. When I first arrived I met Captain Cutrera of the First District and he told me—

Q. Don't say what Captain Cutrera may have said. Did you do anything after that?

A. Yes sir, I approached these four people sitting at the counter and told them the manager had requested that they leave—

Mr. Nelson: I object.

The Court: Objection is overruled.

Mr. Nelson: Reserve a bill of exception.

Examination (resumed).

By Mr. Zibilich:

A. —and I told them they were violating the State law and if the manager insisted that they move we would have [fol. 129] to put them under arrest. I told each one individually. I asked them who was the leader of the group and the white boy said he was. So I again informed him in the presence of the manager that they were violating the City and State laws and if they didn't move we would have to arrest them and he said—

Q. What did he say, you mean Mr. Goldfinch?

A. He told me we came for a purpose and if we don't achieve our purpose we are willing to be arrested, and I told them they had one minute to go with his friends and they didn't move so we phoned for the patrol wagon and about six minutes later it came and we told each one individually they were under arrest and then took them out and put them in the wagon.

Cross examination.

By Mr. Nelson:

Q. You heard the manager talking to them asking them to leave?

A. Yes sir.

Q. I have no further questions.

Technician BERNARD FRUCHTZWEIG, a witness for the State, after first being duly sworn by the Minute Clerk, testified as follows:

Direct exmaination.

By Mr. Zibilich:

Q. State your full name?

A. Bernard Fruchtzweig.

Q. By whom are you employed?

A. New Orleans Police Department.

Q. What capacity?

A. Photographer.

Q. Were you so employed and in the same capacity on the 17th, September, 1960?

A. I was sir.

[fol. 130] Q. On that day, did you have occasion to go to McCrory's Store on Canal Street?

A. Yes sir.

Q. Were you alone or in company with anyone?

A. I was alone when I went there.

Q. I want you to look at these four defendants seated on the bench and ask you whether or not you saw any or all of them at McCrory's Store on that particular day?

A. Yes sir.

Q. You saw all of them?

A. Yes sir.

Q. What did you do?

A. I took some film, movie film.

Q. For about how long did you take film?

A. The film, it is approximately one minute and a half.

Q. Films of what?
A. Them sitting in on the counter.
Q. Did you see the defendants seated on the counter?
A. Yes sir.
Q. Did you bring that film in court today?
A. Yes sir.

Mr. Zibilich: State would ask with the Court's permission to have Officer Fruchtzweig show these films.
The Court: Any objection?
Mr. Nelson: No objection.
I would like the screen placed so the defendants can see it.
[fol. 131] The Court: They can see better than I can.

Examination (resumed).

By Mr. Zibilich:

Q. While you were taking these pictures, did you take pictures of any police officers?
A. Well—

Mr. Nelson: I object it is a leading question.
The Court: Objection overruled.
Mr. Nelson: Reserve a bill of exception.

A. Yes sir.

Examination (resumed).

By Mr. Zibilich:

Q. Would you name those?
A. Not offhand. I can't name any offhand, no sir.
Q. Do you know any of them?
A. I know some of them. When I am shooting pictures I don't watch who I am shooting.

(The film of defendants seated at the counter were shown to the Court.)

Cross examination.

By Mr. Nelson:

Q. Who asked you to bring your camera to McCrory's Store on the 17th of September, 1960?

A. Captain Cutrera.

Q. I have no further questions.

Mr. Zibilich: In connection with the testimony of the preceding witness the state would like to file in evidence, making same State—1, the film just exhibited being a 16 mm. film, 931A and mark same State 1 for identification.

[fol. 132] The Court: Any objection.

Mr. Nelson: None.

The Court: Let it be filed.

Mr. Zibilich: Subject to rebuttal, that is the State's case.

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Nelson: I move for a directed verdict, Your Honor. As I appreciate—

The Court: I didn't hear you.

Mr. Nelson: I move for a directed verdict.

The Court: The motion for a directed verdict is denied.

Mr. Nelson: I'd like about a five minute recess.

[fol. 133] Defense's Case

Mr. RUDOLPH JOSEPH LOMBARD, a witness for the defense (defendant), after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. What is your full name?

A. Rudolph Joseph Lombard.

Q. What is your present address?

A. 516 Newton Street.

Q. What is your occupation?

A. Student.

Q. Where?

A. Xavier University.

Q. Mr. Lombard, were you engaged—were you at the McCrory's Department Store on September 17th, 1960, and were you arrested from that place?

A. Yes sir.

Q. At the time you were arrested were you in the company of the three defendants sitting here?

A. Yes.

Q. Now tell the court what happened when you walked in with the people you walked in with? Will you tell the court?

A. I walked in with Oretha Castle. We took seats at the lunch counter at McCrory's and we were shortly joined by Lanny and Mr. Carter.

Q. Lanny is Goldfinch?

A. Goldfinch. And at that time there was, I think, a manager of the store that shortly approached us and stated that there was a colored counter in the back of the store [fol. 134] and they weren't going to serve us and after that with a whistle, or something, they prepared to close the counter down.

Q. Who whistled?

A. The attendant or manager or assistant manager whatever he may have been and they began to remove the stools and they turned the lights around the counter out and placed a sign stating that the counter was closed. From that time I think the police officers entered the store and the manager approached shortly after and they came up and introduced himself and said he was Mr. Barrett and the counter was closed and they weren't going to serve us and he asked us to leave.

Q. Were you told where to go?

A. No, just said would you please leave.

Q. Did you recognize Mr. Graves that testified here earlier?

A. I think you are referring to the gentleman that I referred to as the attendant or assistant manager or the one in charge of the counter.

Q. Mr. Graves testified before Mr. Barrett in this case, was he the one that came up first?

A. Yes sir.

Q. You say he whistled?

A. He made some sort of signal, I am sure it was a whistle.

Q. Right after that whistle everything else happened?

A. One employee began to move the stools, and to put out the lights and close the counter down.

Q. Were any instructions given before that?

A. No, not to my knowledge.

Q. I have no further question.

Cross examination.

By Mr. Zibilich:

No questions.

Mr. Cecil Winston Carter, a witness for the defense, [fol. 135] first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. Your full name?

A. Cecil Winston Carter, Jr.

Q. What is your address?

A. 337 St. Anthony.

Q. What is your occupation?

A. I am a student.

Q. Where?

A. Dillard University.

Q. Mr. Carter you were arrested at McCrory's store on the 17th of September, 1960 with the other defendants at the bar?

A. I was.

Q. Would you kindly tell the court the circumstances surrounding your arrest? What happened?

A. About 10:30 A. M. I went to the store and I joined the other three defendants who were already seated at the counter and requested service. Upon being denied service by the employees of the store, the one that the previous witness described as the assistant manager he come up

and informed us as a group there was a negro counter in the back and that he wouldn't serve us there and he asked us to go in the back and we sat there and the next thing I knew the counter was in the process of being closed and the sign was put up, the stools removed, the lights were turned out and the foodstuffs on the counter were taken off.

Q. Were any instructions given prior to the employees removing the stools, turning off the lights, etc.?

A. I didn't see any instructions.

Q. What?

A. I didn't see or hear any instructions given.

[fol. 136] Q. Did you recognize Mr. Barrett when he testified, had you ever seen him before?

A. Yes.

Q. What did he tell you in the store anything that day?

A. He said that the counter was closed and asked us to leave.

Q. Did he ask you to leave the store?

A. No he didn't.

Q. What was his words, if you recall?

A. In essence I believe he said this counter is closed and I am asking you to leave, that is all.

Q. I have no further questions.

Cross examination.

By Mr. Zibilich:

Q. Did you leave?

A. No.

Mr. Sydney Langston Goldfinch, Jr., a witness for the defense, defendant, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. What is your full name?

A. Sydney Langston Goldfinch, Jr.

Q. What is your present occupation?

A. Student at Tulane University.

Q. Mr. Goldfinch, you were arrested at McCrory's Department Store on the 17th, September, 1960?

A. I was.

Q. Tell the court the circumstances under which you were arrested?

A. I went to McCrory's about 10:30 and sat at the counter, and shortly was joined by Mr. Lombard who testified earlier, Mr. Carter and Miss Castle, and the man that first [fol. 137] testified for the prosecution came up shortly thereafter and said there was a counter for colored people in the back and when he received no reply or response from any of us he gave a signal and the people, the employees, immediately began to remove the stools, take the dishes off the counter and put up a sign that the counter was closed, then they put off the lights, etc. Shortly thereafter Mr. Barrett came up, identified himself to us and said that the counter was closed. He was standing about three or four feet directly in front of us, in front of me, and he asked us to leave the counter that the counter was closed. We did not leave the counter.

Q. Did he ask any of you to leave the store?

A. No, he did not.

Q. You are positive about that?

A. Quite sure, yes.

Q. When they started removing the stools and cleaning the counter off, were any instructions or any orders given before?

A. Well it appeared to be a very efficient thing, everyone knew what to do. Everybody seemed to know what to do and performed their functions.

Q. Did you hear any instructions?

A. Didn't hear any instructions. Just a signal of some sort, a whistle of some sort of hand signal.

Mr. Zibilich: No questions.

Miss ORETHA MAUREEN CASTLE, a witness for the defense (defendant), after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. What is your full name?
[fol. 138] A. Oretha Maureen Castle.
Q. What is your present occupation?
A. Student.
Q. Where?
A. Southern University.
Q. Southern University at New Orleans?
A. Yes.
Q. Were you arrested at McCrory's Department Store on the 17th, of September, 1960?
A. I was.
Q. Will you tell the court the circumstances surrounding your arrest?
A. I was involved in a so-called sit in demonstration. I went in the store and sat at a side counter, lunch counter, and sat down. Shortly after we sat there a man appeared before us and said the colored lunch counter was in the back and that he couldn't serve us and when we didn't reply he had the counter closed and after that another man appeared before us and identified himself as the manager of the store and asked us to leave the counter.
Q. You ever requested to leave the store by the manager?
A. No.

Mr. Zibilich: No questions.
The Court: Is that your case?
Mr. Nelson: That is our case.
The Court: Any rebuttal.
[fol. 139] Mr. Zibilich: No, Your Honor.
The Court: You gentlemen wish to argue the matter?
Mr. Zibilich: The State submits it.

(The matter was argued by Mr. Nelson.)

The Court: You wish to be heard Mr. Elie?
Mr. Elie: No. Mr. Nelson is to all of the defendants.

VERDICT

The Court: The Court finds the defendants guilty as charged.

The Court will fix the sentencing of these defendants on the third of January, 1961 and in the interim the defendants are discharged on their bail until the third of January.

[fol. 140] Reporter's Certificate (omitted in printing).

[fol. 141] Clerk's Certificate (omitted in printing).

[fol. 142]

DEFENSE EXHIBIT 1

Statement of De Lesseps S. Morrison, Mayor of the City of New Orleans, made on September 13, 1960, and identified as Defense 1 (Appellant 1).

The statement by Mayor Morrison Monday follows:

"I have today directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted.

"The police department, in my judgment, has handled the initial sit-in demonstration Friday and the follow-up picketing activity Saturday in an efficient and creditable manner. This is in keeping with the oft-announced policy of the New Orleans city government that peace and order in our city will be preserved.

"I have carefully reviewed the reports of these two initial demonstrations by a small group of misguided white and Negro students, or former students. It is my considered opinion that regardless of the avowed purpose or intent of the participants, the effect of such demonstrations is not in the public interest of this community.

"Act 70 of the 1960 Legislative session redefines disturbing the peace to include 'the commission of any act as would foreseeably disturb or alarm the public.'

"Act 70 also provides that persons who seek to prevent prospective customers from entering private premises to transact business shall be guilty of disorderly conduct and disturbing the peace.

"Act 80—obstructing public passages—provides that 'no person shall wilfully obstruct the free, convenient, and normal use of any public sidewalk, street, highway, road, bridge, alley or other passage way or the entrance, corridor or passage of any public building, structure, water craft or ferry by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.'

"It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department."

[fol. 143]

DEFENSE EXHIBIT 2

Statement of Joseph I. Giarrusso, Superintendent of Police, City of New Orleans, issued on September 10, 1960, and marked for identification Defense 2 (Appellant 2).

Giarrusso Statement

Giarrusso issued the following statement:

"The regrettable sit-in activity today at the lunch counter of a Canal st. chain store by several young white and Negro persons causes me to issue this statement to the citizens of New Orleans.

"We urge every adult and juvenile to read this statement carefully, completely and calmly.

"First, it is important that all citizens of our community understand that this sit-in demonstration was initiated by a very small group.

"We firmly believe that they do not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population.

"We believe it is most important that the mature responsible citizens of both races in this city understand that and that they continue the exercise of sound, individual judgment, goodwill and a sense of personal and community responsibility.

"Members of both the white and Negro groups in New Orleans for the most part are aware of the individual's obligation for good conduct—an obligation both to himself and to his community. With the exercise of continued, responsible law-abiding conduct by all persons, we see no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans.

"At the same time we wish to say to every adult and juvenile in this city that the police department intends to maintain peace and order.

"No one should have any concern or question over either the intent or the ability of this department to keep and preserve peace and order.

"As part of its regular operating program, the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property.

"We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest.

"Finally, we want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana."

[fol. 146]

SUPREME COURT

STATE OF LOUISIANA

No. 45,491

STATE OF LOUISIANA,

VS.

SIDNEY LANGSTON GOLDFINCH, JR., et al.

OPINION

Appeal From the Criminal District Court
Parish of Orleans

Honorable J. Bernard Cocke, Judge

SUMMERS, Justice

The four defendants herein, a white and three Negroes, were jointly charged in a bill of information filed by the District Attorney of Orleans Parish with criminal mischief in that on September 17, 1960, they took possession of the lunch counter at McCrory's Store, and remained there after being ordered to leave by the manager in violation of the provisions of Title 14, Section 59 of the Revised Statutes of the State of Louisiana, the pertinent portions of which provide:

> "Criminal mischief is the intentional performance of any of the following acts:
>
> * * * * * * *
>
> (6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

[fol. 147] The defendants entered McCrory's store in New Orleans on the morning in question and took seats at one

of the counters therein. McCrory's is part of a national chain operating in thirty-four states, owned by McCrory Stores, Incorporated. The New Orleans establishment is classified as a "variety merchandise" type store, made up of approximately twenty departments and open to the general public. Included in its services to the public are eating facilities composed of a main restaurant that seats 210, a counter for colored persons that seats 53, a refreshment bar that seats 24, and two stand-up counters.

The defendants were refused service at the counter where they were seated and which was reserved for whites, the manager was called, the counter was closed, and the defendants were requested to leave—in accordance with the policy of the store, fixed and determined by the manager in catering to the desires of his customers—or to seek service at a counter in the store providing service for Negroes. Upon their refusal, the police, who had been summoned by the manager, arrested them. They were subsequently tried and convicted of having violated the foregoing statute.

Defendants filed a motion to quash, motion for a new trial and a motion in arrest of judgment, all of which were overruled, and objected to the refusal of the Court to permit the introduction of certain evidence to which bills of exceptions were reserved.

These motions and bills of exceptions pertain primarily to the contention of defendants that the statute under which they were convicted, in its application against Negroes, is unconstitutional and discriminatory in that it denies to them the guarantees afforded by the Due Process and Equal Protection clauses of the Constitution of the United States and the Constitution of the State of Louisiana, particularly that afforded by the Fourteenth Amendment to the Constitution of the United States.

[fol. 148] There should be no doubt, and none remains in our minds, about the applicability of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the state rather than private persons. The second sentence contains the phrases, "No State shall make or enforce any law * * * " and "nor shall any State deprive any person * * * ."

Since the decision in the Civil Rights Cases, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18, it has been unequivocally under-

stood that the Fourteenth Amendment covers state action and not individual action. Mr. Justice Bradley, speaking for the majority in these cases, stated:

> "The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States * * *."
>
> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."

The foregoing concrete language indicates emphatically that positive action by state officers and agencies is the contemplated prohibition of the amendment. 43 Cornell L.Q. 375. Mr. Justice Bradley further stated that the wrongful act of an individual is not state action "if not sanctioned in some way by the State, or not done under State authority. * * *." This proposition has been constantly reiterated by the highest court of our land. In Shelley v. Kraemer, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, it was stated thusly: "Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

[fol. 149] We are, therefore, called upon to determine whether the enactment of the questioned statute is such action by the State as is prohibited by the Fourteenth Amendment. In this connection it is recognized that the enactment of a statute which on its face provides for discrimination based upon race or color is a violation of the Fourteenth Amendment and constitutes state actions which that constitutional amendment prohibits.

A reading of the statute readily discloses that it makes no reference to any class, race or group and applies to all persons alike, regardless of race. It confers no more rights

on members of the white race than are conferred on members of the Negro race, nor does it provide more privileges to members of the white race than to members of the Negro race. Williams v. Howard Johnson's Restaurant, 268 F. 2d 845. The statute under consideration here stands no differently than does one imposing a penalty upon a person who enters without right the posted lands of another. It is not such a law as would be marked with the characteristic that it has been promulgated by our State for a special design against the race of persons to which defendants belong. To the contrary it is such a law that finds widespread acceptance throughout America. It is a legislative recognition of rights accorded to the owners of property similar to those found in almost all states of our nation. Mr. Justice Black in Martin v. City of Struthers, 319 U.S. 141, 87 L. Ed. 1313, 63 S. Ct. 862, referring to a statute of Virginia similar in scope to that here involved, said: "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more."

Not being impressed with features which would make it as discriminatory and *a fortiori* unconstitutional,[1] we conclude that the constitutionality of the statute must be pre- [fol. 150] sumed. State v. Winehill & Rosenthal, 147 La. 781, 86 So. 181, writ of error dismissed 258 U.S. 605; Panama R. R. Co. v. Johnson, 264 U.S. 375, 68 L. Ed. 748, 44 S. Ct. 391; Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 72 L. Ed. 303, 48 S. Ct. 194; State v. Grosjean, 182 La. 298, 161 So. 871; State v. Saia, 212 La. 868, 33 So. 2d 665; Schwegmann Bros. v. La. Board of Alcoholic Beverage Control, 216 La. 148, 43 So. 2d 248; Olivedell Planting Co. v. Town of Lake Providence, 217 La. 621, 47

[1] Buchanan v. Warley, 245 U.S. 60, 62 L. Ed. 149, 38 S. Ct. 16; Flemming v. South Carolina Electric and Gas Co., 224 F. 2d 752, appeal dismissed, 351 U.S. 901; Browder v. Gayle, 142 F. Supp. 707, affirmed, 352 U.S. 903; Evers v. Dwyer, 358 U.S. 202, 3 L. Ed. 2d 222, 79 S. Ct. 178; Dorsey v. State Athletic Comm., 168 F. Supp. 149, appeal dismissed and certiorari denied, 359 U.S. 533.

So. 2d 23; Jones v. State Board of Education, 219 La. 630, 53 So. 2d 792; State v. Rones, 223 La. 839, 67 So. 2d 99; State v. McCrory, 237 La. 747, 112 So. 2d 432; Michon v. La. State Board of Optometry Examiners, 121 So. 2d 565; 11 Am. Jur., Const. Law, Sec. 97.

Furthermore, courts will not hold a statute unconstitutional because the legislature had an unconstitutional intent in enacting the statute which has not been shown here. Doyle v. Continental Insurance Co., 94 U.S. 535, 24 L. Ed. 148; Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 93 L. Ed. 632, 69 S. Ct. 550; State v. County Comm., 224 Ala. 229, 139 So. 243; Morgan v. Edmondson, 238 Ala. 522, 192 So. 274. The courts will test a statute as it stands, without considering how it might be enforced. James v. Todd, 267 Ala. 495, 103 So. 2d 19, appeal dismissed, 358 U.S. 206; Clark v. State, 169 Miss. 369, 152 So. 820. Courts in considering constitutionality of legislation cannot search for motive. Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372, affirmed, 358 U.S. 101.

Defendants further assert in their attack upon the statute that by content, reference and position of context it is designed to apply to, and be enforced in an arbitrary manner against, members of the Negro race and those acting in concert with them. In aid of this assertion certain House bills of the Louisiana Legislature for 1960, introduced in the same session with the contested statute, were offered in evidence.[2] All of these bills did not become law, but [fol. 151] some did.[3] It is declared that this law and the others enacted during the same session were designed to apply to and be enforced against, in an arbitrary manner, members of the Negro race. We have carefully reviewed the provisions of these bills referred to which were enacted into law and nowhere in their content or context do we find that any of them seek to discriminate against any class, group, or race of persons. We therefore find no merit in

[2] See Official Journal of the Proceedings of the House of Representatives of the State of Louisiana, 23rd Regular Session, 1960, House Bills 343-366, inclusive.

[3] See Acts 68, 69, 70, 73, 76, 77, 78, 79, and 81, representing the only House Bills referred to in Footnote 1, which were enacted by the Legislature.

this contention and, accordingly, dismiss it as being unsupported.

But the primary contention here, conceding the constitutionality of the statute on its face, has for its basis that the statute is unconstitutional in its application and the manager and employees of the store were acting in concert with the municipal police officers who made the arrest, the district attorney in charging defendants, and the court in trying defendants' guilt; that these acts constitute such state action as is contemplated by the prohibition of the Fourteenth Amendment. We have noted, however, that in order for state action to constitute an unconstitutional denial of equal protection to the defendants here that action must provide for discrimination of a nature that is intentional, purposeful, or systematic. Snowden v. Hughes, 321 U.S. 1, 88 L. Ed. 497, 64 S. Ct. 397; Charleston Federal Savings & Loan Assn. v. Alderson, 324 U.S. 182, 89 L. Ed. 857, 65 S. Ct. 624; City of Omaha v. Lewis & Smith Drug Co., 156 Neb. 650, 57 N.W. 2d 269; Zorack v. Clauson, 303 N.Y. 161, 100 N.E. 2d 463; State v. Anderson, 206 La. 986, 20 So. 2d 288; City of New Orleans v. Levy, 233 La. 844, 98 So. 2d 210; 12 Am. Jur., Constitutional Law, Sec. 566. Nor is a discriminatory purpose to be presumed. Tarrance v. Florida, 188 U.S. 519, 47 L. Ed. 572, 23 S. Ct. 402.

The defendants sought to introduce evidence to establish that the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers, and they would have this Court hold that this action of McCrory's was not its own voluntary action, but was influenced by the officers of the state. The conclusion contended for is in-
[fol. 152] compatible with the facts. Rather, the testimony supports a finding that the manager of McCrory's had for the past several years refused service to Negroes, that the policy of the store was established by him, that he had set out the policy and followed it consistently; that Negroes had habitually been granted access to only one counter within the store and a deliberately provoked mischief and disturbance such as the one he complained of here had not previously occurred. In the past other Negroes who had mistakenly taken seats at the counter in question and who were told to move had cooperated and recognized the re-

quests of the McCrory's employees and had sat at the counter set aside for them.

Even under the provision of the questioned statute it is apparent that a prosecution is dependent upon the will of the proprietor, for only after he has ordered the intruder to relinquish possession of his place of business does a violation of the statute occur. The state, therefore, without the exercise of the proprietor's will can find no basis under the statute to prosecute.

These facts lead us to the conclusion that the existence of a discriminatory design by the state, its officers or agents, or by its established policy, assuming such could have been shown, would have had no influence upon the actions of McCrory's. The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any governmental action, design, or policy—state or municipal—and the arrest was accomplished in keeping with McCrory's business practice established and maintained long before the occasion which defendants seek to associate with a discriminatory design by the state. Furthermore, it is quite clear from the oral argument of defense counsel that this prosecution was sought after and provoked by the defendants themselves, and in reality the conviction they have sustained is the result of their own contrivance and mischief and is not attributable to state action.

[fol. 153] The business practice which McCrory's had adopted was recognized then and is now recognized by us to be a practice based upon rights to which the law gives sanction. It has been expressed as follows:

"The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation * * * The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants." See State v. Clyburn, 247 N.C. 455, 101 S.E. 2d 295, and authorities therein cited. This right of the operator of a private enterprise is a well-recognized one as defendants concede. "The rule that, except in cases of common carriers, innkeepers and similar public callings, one

may choose his customers is not archaic." Greenfield v. Maryland Jockey Club, 190 Md. 96, 57 A. 2d 335.

The right to prevent a disturbance on one's private property and the right to summon law enforcement officers to enforce that right are rights which every proprietor of a business has whenever he refuses to deal with a customer for any reason, racial or otherwise, and the exercise of those rights does not render his action state action or constitute a conspiracy between the proprietor and the peace officer which would result in state action. Slack v. Atlantic White Tower System, Inc., 181 F. Supp. 124, affirmed, 284 F. 2d 746.

There is presently no anti-discrimination statute in Louisiana, nor is there any legislation compelling the segregation of the races in restaurants or places where food is served. There being no law of this State, statutory or decisional, requiring segregation of the races in restaurants or places where food is served, the contention that the action of the officials here is discriminatory is not well-founded for that action is not authorized by state law.

The defendants have sought to show through evidence adduced at the trial that there is no integration of the races in eating places in New Orleans and, therefore, the custom of the state is one that supports segregation and [fol. 154] hence state action is involved. This argument overlooks the fact that the segregation of the races prevailing in eating places in Louisiana is not required by any statute or decisional law of the State or other governmental body, but is the result of the business choice of the individual proprietors, both white and Negro, catering to the desires and wishes of their customers, regardless of what may stimulate and form the basis of the desires. Slack v. Atlantic White Tower System, Inc., supra.

To the same effect is the language of the Court in Williams v. Howard Johnson's Restaurant, supra, viz.:

> "This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices.
>
> • • • • • • •

"The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment."

The effect of the contentions of defendants is to urge us to disregard and ignore certain rights of owners and taxpayers in the enjoyment of their property, unaffected by any public interest, in order that they may impose upon the proprietor their own concept of the proper use of his property unsupported by any right under the law or Constitution to do so. We cannot forsake the rights of some citizens and establish rights for others not already granted by law to the prejudice of the former; this is a legislative function which it is not proper for this Court to usurp. Tamalleo v. New Hampshire Jockey Club, Inc., 102 N. H. 547, 163 A. 2d 10. The fundamental propositions presented here are not novel; we treat them as settled and their change is beyond our province.

The conviction and sentence are affirmed.

[fol. 155]

SUPREME COURT

STATE OF LOUISIANA

[Title omitted]

PETITION FOR REHEARING

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of Louisiana:

The petition of Sydney L. Goldfinch, Jr., Rudolph Lombard, Oretha Castle and Cecil Carter, Jr., through their undersigned counsel, with respect shows:

I.

That the decree of this Honorable Court rendered on the 29th day of June, 1961, in the above entitled and numbered cause, is contrary to the law and jurisprudence of the State of Louisiana and the United States and that this Court

should grant a re-hearing to correct errors in said decree, which are as follows:

(1) The Court was in error in finding lack of "state action" in the demand that the defendants leave the counter. In the decree rendered by this Court, on Page 7 we find the following:

> "... The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any government action, design, or policy—state or municipal ..."

This finding completely ignores the orders of Mayor Mor- [fol. 156] rison issued to the police on September 13, 1960, —4 days before the named "sat-in". The pertinent part of Mayor Morrison's instructions are as follows:

> "I have today directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted.
>
> • • • • • • •
>
> "It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department."

A reading of the record will clearly show that the entire act was initiated by action of the municipal government—a state agency. At no time did the manager of the store request that the defendants "leave the premises." The ejection of the defendants from the premises was initiated and carried out by members of the New Orleans Police Department.

(2) The Court was in error in failing to consider the contemporary history of the statute in question, namely Act 77(1) of 1960 (R.S. 14:59(6)). The Court did not give due regard to the relevant conditions existing in the state at the time R.S. 14:59(6) was adopted and enforced.

(3) The Court was in error in failing to find that the segregation policies of the state and municipal governments were the determining factor in the segregated eating facilities in McCrory's, hence the decision of the management to continue segregated eating facilities was state action.

(4) This Court in its decree on page 3 held that:

"positive action by state officers and agencies is the contemplated prohibition of the (14th) Amendment. 43 Cornell L.Q. 375. Mr. Justice Bradley further stated that the wrongful act of an individual is not state action 'if not sanctioned in some way by the state, or not done under state authority. . . .'"

The evidence shows that the policy of the police was to prohibit sit-in demonstration. The evidence further shows on page 125 of the transcript that the manager had a [fol. 157] conference with Captain Cutrera of the New Orleans Police Department prior to giving any instructions to the defendants about leaving.

Bill of Exception No. 2 was taken when the Trial Judge refused the defendants the right to introduce evidence showing that the refusal was a result of police action.

This Court was in error in failing to find that this refusal was prejudicial to the defendants.

Wherefore, petitioners pray that this Court grant a re-hearing to Sydney L. Goldfinch, Jr., Rudolph Lombard, Oretha Castle and Cecil Carter, Jr.

John P. Nelson, Jr., Lolis E. Eli, Nils R. Douglas, Robert F. Collins, Attorneys for Petitioners, By: John P. Nelson, Jr.

Duly sworn to by John P. Nelson, Jr., jurat omitted in printing.

[fol. 158]

IN THE SUPREME COURT OF THE STATE OF LOUISIANA

ORDER REFUSING APPLICATION FOR REHEARING—
October 4, 1961

Court was duly opened, pursuant to adjournment. Present, Their Honors: John B. Fournet, Chief Justice, Joe B. Hamiter, Frank W. Hawthorne, E. Howard McCaleb, Walter B. Hamlin, Joe W. Sanders and Frank W. Summers, Associate Justices.

Action by the Court on Applications for Rehearing

Rehearings were refused in the following cases:

* * * * * * *

45,491 State v. Goldfinch, Jr., et al.

* * * * * * *

[fol. 165] Clerk's Certificate (omitted in printing).

[fol. 166]

SUPREME COURT OF THE UNITED STATES

No. 638, October Term, 1961

RUDOLPH LOMBARD, et al., Petitioners,

vs.

LOUISIANA.

ORDER ALLOWING CERTIORARI—June 25, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of Louisiana is granted, and the case is transferred to the summary calendar. The case is set for argument to follow No. 287.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this petition.